Office-Supreme Court, U.S.
FILED
APR 14 1983
ALEXANDER L. STEVAS,
CLERK

82-1692

No. _____

IN THE

# Supreme Court of the United States

October Term, 1982

ROBERT ARGENTO and JOSEPH SANSONE,

*Petitioners,*

*v.*

BENNIE LENARD,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN G. POUST,
*Counsel of Record*
STEPHEN E. SWARD
CHRISTINE M. WHEELOCK
Xerox Centre, Suite 1500
55 West Monroe Street
Chicago, Illinois 60603
(312) 372-5600
ROOKS, PITTS, FULLAGAR AND POUST
*Attorneys for Petitioners*

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Pursuant to the provisions of 28 U.S.C. 2101(c) and Supreme Court Rule 17, petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Seventh Circuit entered in this proceeding on February 1, 1983[1].

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[1]The Plaintiff in the proceeding below is Bennie Lenard. The defendants are the Village of Melrose Park, Robert Argento, Joseph Sansone, George Zito and Bruce Culotta.

## QUESTIONS PRESENTED

1. Whether a civil conspiracy under 42 U.S.C. §1985(3) can be found in the absence of a finding of an overt act in furtherance of the alleged conspiracy.

2. Whether given a finding of a civil conspiracy under 42 U.S.C §1985(3) alleged conspirators can be held liable for damages not shown to be the result of acts performed in furtherance of the conspiracy.

3. Whether arresting officers are liable for any and all injuries and/or deprivation of constitutional rights allegedly sustained by a prisoner while in police custody, regardless of the lawfulness of the arrest or the officers' causation of said injuries or deprivations of constitutional rights.

4. Whether a plaintiff is entitled to attorney's fees and costs as to an appeal which was (a) necessitated by errors made by the District Court requiring reversal of judgment entered on two counts; (b) affirmance of one count in favor of petitioner; and (c) remandment of one count for retrial in which damages were awarded pursuant to grossly erroneous jury instructions on damages as a result of which the said remaining count damages were erroneously and excessively awarded.

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## OPINIONS BELOW

The opinion of the Court of Appeals is published at 699 F.2d 874, and is set forth in Appendix A hereto. The mandate of the Court of Appeals, order denying petition for rehearing, and order staying issuance of mandate, are set forth in Exhibit B hereto. The pertinent judgments of the District Court are set forth in Appendix C. The jury verdicts are set forth in Appendix D.

## JURISDICTION

The judgment and opinion of the Court of Appeals was entered on February 1, 1983. A Petition for Rehearing was filed on February 18, 1983 and denied on March 10, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §§1254(1), 2101(c) and Rule 17 of this Court.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

This case involves the Fourteenth Amendment; the Civil Rights Act of 1871, as amended, and in particular 42 U.S.C. §§1983, 1985 and 1988; and Rule 18 of the Rules of the Court of Appeals for the Seventh Circuit, the texts of which are set forth in Appendix E.

## STATEMENT OF THE CASE

Lenard initiated this action in a five-count complaint pursuant to several sections of the Civil Rights Act of 1871, 42 U.S.C. §§1983, 1985 and 1988. Jurisdiction was based on the Eighth, Thirteenth and Fourteenth Amendments to the Constitution and on 28 U.S.C. §1331 and 1343. The named defendants included the Village of Melrose Park, Robert Argento, Joseph Sansone, Bruce Culotta, George Zito, (Village police officers), Andrea Dreyer, Dr. T. Mehrpuyan and Westlake Com-

munity Hospital. Westlake Hosital and Dr. Mehrpuyan reached a settlement with Lenard and they, along with Count IV of the Complaint, were dismissed from the suit. Andrea Dreyer was defaulted. Count I of the Second Amended Complaint charged Police Officers Argento, Sansone and Culotta and Zito with violating 42 U.S.C. §1983 by beating Lenard. Count II charged these same officers with conspiracy to deprive equal protection of the law by use of brutal and excessive force on Lenard in violation of 42 U.S.C. §1985(3) and the Village of Melrose Park for failure to properly screen, hire, train and supervise its police employees in violation of 42 U.S.C. §§1983 and 1985. Count III charged all defendants with a conspiracy to impede, obstruct and defeat the due course of justice with intent to deny equal protection in violation of 42 U.S.C.

§1985(2). Count V charged Officer Argento, Officer Sansone and Dreyer with malicious prosecution for the charges resulting from the traffic accident and arrest, thereby depriving Lenard of his civil rights under 42 U.S.C. §1983.

A bifurcated trial lasting five weeks was held on liability and damages in February and March, 1980. While it was Lenard's testimony that following an automobile accident he was cursed and struck about his head and right eye with what appeared to be a stick by Argento after he was placed in the backseat of Argento's squad car at the scene of the accident and that he was also beaten while entering the police station, the jury found that this was not so and returned a not guilty verdict in favor of all defendants upon Count I, the "beating count."

Independent witnesses at the accident

scene testified as to Lenard's drunken demeanor, that he assaulted the other driver, and that he was not beaten (RP 1950-1958 Davies; RP 1831-1833 Winslow) Officers Argento, Zito and Culotta testified that Lenard was injured in two falls in the icy parking lot and by a fall on the stairwell in the police station. These officers testified that Lenard was struggling and resisting his removal into the station. His size, drunken condition, his struggling, and the physical weather conditions were the cause of the falls. (RP 294-298; 752-762; 822-823; 2018-2021)

Despite Lenard's admission of consuming nine alcoholic drinks, the finding of both an open can of beer and a gun in his car (RP 285-287, 1832-1835) and the complaint of Dreyer that Lenard had punched her at the accident scene (RP 613-615, 1759, 702, 1950) the trial court permitted

Counts III (42 U.S.C. 1985(2) conspiracy) and V (malicious prosecution) to go to the jury along with Counts I (42 U.S.C. 1983) and II (42 U.S.C. 1985(3). The jury found for Lenard on the two conspiracy charges of Counts II and III and the malicious prosecution charge of Count V against Argento and Sansone only. As above stated, the jury found in favor of all defendants on Count I. In the damage portion of the trial, Lenard was prohibited by the District Court from presenting any damage evidence concerning his physical injuries, consistent with the jury's finding of no "beating" under Count I. (RP 2345) No other evidence of damages was presented by Lenard. Over defense objection, the jury was given a jury verdict form by the trial judge which provided for three categories of damages: "compensatory", "substantial", "punitive" and instructions and

comments by the District Court relating to damages under that verdict form which intertwined mention that "substantial" damages could be awarded eleven times and that punitive damages could be awarded twelve times and other times in the verdict forms. (RP 2381-2385) The jury returned a finding of $10,000 actual and compensatory damages, $125,000 "substantial damages," and $150,000 punitive damages against Argento and $75,000 punitive damages against Sansone.

The Court of Appeals affirmed the jury verdict for all defendants on Count I, i.e., as to the Section 1983 claim that plaintiff's rights were violated by beating him. It reversed the jury verdict on Count V, the malicious prosecution claim, on the basis that the evidence showed ample probable cause for Lenard's arrest and prosecution for the charges made against

him . (e.g. driving while intoxicated, open can of beer and gun in his car, RP 285-287, 1832-1835). Noting that the parties agreed that Count III, the conspiracy claim under Section 1985(3) related to a conspiracy to maliciously prosecute the plaintiff, the Court of Appeals also reversed the verdict on that count, holding that the Section 1985(2) conspiracy claim was dependent on the existence of a finding of malicious prosecution and given the lack of existence of the latter, Count III must be reversed "for failure of an act implementing the conspiracy." (Appendix A., p. 24a.)

On the issue of damages, the Court agreed with defendants' contention that the trial court's creation of a category of damages called "substantial damages" was in error, and that further the multiple repetition of the term "substantial"

intertwined throughout the instructions required reversal of the whole damage award. Also, the Court of Appeals held for the additional reason that in light of its reversal of certain counts which involved punitive damages which had not been allocated as to the separate counts, the award should be reversed. The court stated:

> We cannot but feel that the repeated use of the phrase substantial damages by the district court (11 times, plus inclusion as a category in the verdict form) in its instructions to the jury and the instruction that such damages could be awarded without proof of actual injury greatly influenced this large verdict. 'Repetitious instructions which place undue emphasis on matters favorable to either side constitute reversible error.' Flentie v. American Community Stores, Corp. 389 F.2d 80, 83 (8th Cir. 1968). In light of the erroneous use of the term 'substantial' in the verdict form and the instructions in keeping with that form, we reverse and remand this case for retrial on the issue of damages. (emphasis added) (Appendix A., p. 50a.)

With respect to the expense of the appeal, the court remanded determination of fees to the district court to be recalculated in light of the results of the appeal. The Court expressly noted that the district court should also award fees for time spent on the issues on which plaintiff was successful on appeal. The full costs and a portion of the fees of the appeal were assessed against defendants Argento and Sansone, notwithstanding that they were required to appeal to rectify the very judgments against them which the Court of Appeal found in error.

As to Count II, the Court notwithstanding the not guilty finding on the Count I beating charges, affirmed the verdict in favor of defendant Officers Zito and Culotta, but affirmed the verdicts against defendant Officers Argento and Sansone. Despite the affirmance of the not

guilty verdict on the beatings, the Court further ruled that the evidence of Lenard's physical injuries could be presented to the jury on retrial of Count II as "injuries incurred somehow while under police supervision and protection" although "not as being the result of a beating" (emphasis added). (Appendix A., p. 55a.), a strange reasoning in light of the fact that even the plaintiff's attorney, Bertucci stated to the trial judge: "The only conspiracy was a conspiracy to beat him, correct? The first conspiracy in Count II?" (RP2346). (emphasis added) This was in an attempt to get the court to permit the injuries to be allowed as evidence of damages in regard to the Count II conspiracy alleged per 1985(3). The Court of Appeals remanded Count II to the district court for retrial on the issue of damages only.

To summarize, the Court below took the following action:

1. Affirmed the jury verdict as to Count I (physical beating alleged);

2. Affirmed the jury verdict as to liability under Count II but reversed as to damages as to all counts and remanded for retrial as to damages under Count II (42 U.S.C. 1985(3) conspiracy to deny rights alleged) as to defendants Argento and Sansone;

3. Reversed the jury verdict as to Count III (42 U.S.C. 1985(2) conspiracy to obstruct justice) as to defendants Argento and Sansone;

4. Reversed the jury verdict as to Count V (malicious prosecution) as to defendants Argento and Sansone;

5. Affirmed the jury verdicts as to Zito and Culotta (finding in their favor);

6. Affirmed the directed verdict as to the Village of Melrose Park (finding in its favor);

7. Reversed the District Court's award of $180,500 in attorney's fees and remanded for recalculation in light of its opinion;

8. Remanded to the District Court for determination of attorney's fees on appeal for those issues on which Lenard prevailed in the Court of Appeals;

9. Suspended the application of Seventh Circuit Rule 18, which prohibits reassignment of remanded case to the same trial judge.

Defendants Argento and Sansone timely filed a petition for rehearing as to the affirmance of liability under Count II, the holding that evidence of Lenard's physical injuries should be presented to the jury on retrial, the assessment of the cost of the appeal against defendants, and the Court's further holding that Circuit Rule 18, providing that on remand a case shall follow normal procedures regarding non-assignment to the same trial judge should not apply. This petition for rehearing was denied without comment by the Court on March 10, 1983.

## REASONS FOR GRANTING THE WRIT

1. IN CONTRAVENTION OF THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS, THE DECISION BELOW PERMITS RECOVERY UNDER 42 U.S.C. §1985(3) WHERE THE JURY FOUND NO OVERT ACT AND NO EVIDENCE EXISTS TO CONNECT THESE DEFENDANTS WITH ANY OTHER WRONGFUL CONDUCT DIRECTED TOWARD THE PLAINTIFF

Until this Court of Appeals decision, it was an established principle of law that for a plaintiff to recover based on a Section 1985(3) conspiracy, he was obliged to establish by a preponderance of the evidence that (a) defendants entered into a plan or agreement to deny plaintiff his civil rights, (b) one or more of the defendants participated in an overt act in furtherance of the conspiracy, and (c)that the act resulted in the alleged damage sustained. As this Court made clear in its decision in Collins v. Hardyman, 341 U.S. 651, 659 (1951), unlike statutes dealing with criminal conspiracy, wherein the mere existence of the unlawful agreement may be the basis for liability, Section 1985(3) expressly requires "overt acts necessary to consummate the conspiracy as an actionable wrong." Similarly, in Griffin v. Breckenridge, 403 U.S. 88, 103 (1971),

this Court held that to state a cause of action under Section 1985(3), the plaintiff must prove that, inter alia, the conspirators "did, or caused to be done, 'any act in furtherance of the object of [the] conspiracy,' whereby another was . . . 'injured in his person' or property or . . . 'deprived of having and exercising any right or privilege of a citizen of the United States.'" These decisions are consistent with the general law governing civil conspiracies, under which it is held that there is no liability for a civil conspiracy unless damage results from acts done by one or more of the conspirators in furtherance of the conspiracy. See, e.g., Blackwelder v. Millman, 522 F.2d 766 (4th Cir. 1975). In constrast to the foregoing well-established principles of law, the decision below stands for the proposition that once an agreement is found, the

alleged conspirators will be held liable for any injuries sustained by the plaintiff, whether or not such injuries were the result of any actions in furtherance of the conspiracy, and, indeed, whether or not one or more of the conspirators caused such injuries. As this Court has previously noted, "[t]he tort of 'conspiracy' is poorly defined, and highly susceptible to judicial expansion . . ." United Mine Workers of America v. Gibbs, 383 U.S. 731, 732 (1966). The opinion of the Court below represents a classic case of the dangers of judicial expansion of this tort warned against by this Court in Gibbs. Id. at 732n.19. It also brings clearly into focus the acute need for this Court to furnish proper standards for liability under a civil conspiracy theory and to set aside the unprecedented and overly broad expansion of this theory by the Court of Appeals.

The factual summary of this case by the Court of Appeals dramatizes the plight of these defendants and indeed of all police officers. The first contact between the plaintiff and Officer Sansone occurred when as a result of a citizen complaint, (RP 486) Officer Sansone went to the scene of a minor automobile accident where Lenard, the driver of one car, was present along with the driver of the other car and other witnesses. Officer Argento came to the scene shortly after Officer Sansone. Based on Lenard's intoxicated condition, the presence of a gun and open can of beer in Lenard's car and the statements of the other driver concerning Lenard's physical assault on her, Officers Sansone and

Argento arrested Lenard.[2] (RP 488 - 494; 280 - 289)

After Lenard was taken into custody at the scene and placed in Argento's squad car, the evidence is in direct conflict as to Argento, but not as to Sansone, who never had any further contact with Lenard, and presented to the jury the "seminal issue of the entire case" (Appendix A., p. 15a.) In brief, the contentions of the parties were as follows:

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[2]The Court of Appeals held as a matter of law that the arrest was lawful and reversed the jury's verdict in favor of the plaintiff on Count V which charged malicious prosecution. The Court of Appeals also held in accordance with established conspiracy law that in the absence of the overt act of malicious prosecution, there could not be a conspiracy to maliciously prosecute Lenard as charged by Lenard in Count III of his complaint. Had the Court of Appeals applied this same standard to the other conspiracy charged by Lenard in Count II of his complaint, this Petition would not be necessary.

A. Lenard: -- Lenard testified that after being placed in Argento's squad car he was struck by Argento about his head and right eye with what appeared to be a stick, rendering him unconscious. His next recollection was that of sitting in the squad car as it pulled up to the police station and hearing Argento tell someone "I got a big Black nigger." He testified that he was then grabbed about the neck, pulled from the car, fell to his knees and was kicked and beaten. (RP 1574 - 84)

B. Officers[3] -- The testimony of the officers was that Lenard was drunk and abusive at the scene of the accident. (RP 280

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[3]And also independent witnesses Davies and Winslow (RP 1831-33, 1958,) who saw the arrest and testified Argento did not strike Lenard.

- 287) Officer Argento testified that upon arriving at the police station he attempted to remove Lenard from the car, but Lenard was kicking, using vulgar and obscene language and resisting. He radioed into the station for assistance and Officers Zito and Culotta responded. Officers Argento, Zito, and Culotta all testified that Lenard was struggling and resisting his removal into the station. (RP 1910 Culotta; Zito 2016 - 2023) Given his struggling, size, drunken condition and weather conditions, he was injured in two falls in the icy parking lot and a fall on the stairwell in the police station. (RP 290 - 299 Argento)

The jury returned a verdict in favor of the officers, thereby finding that Lenard's injuries were not the result of a beating as he had alleged in Count I of his complaint but resulted from his own im-

proper resistance to being taken into the station house. That the jury was of this opinion is further evidenced by the not guilty verdicts in favor of Officers Zito and Culotta. Their only involvement was to assist in bringing Lenard into the station house from the squad car. If Lenard's civil rights had been violated at that time, i.e., by use of excessive force, Zito and Culotta would have been found liable to plaintiff under Count I as would Argento. No other evidence other than as set forth above was offered to explain Lenard's physical injuries. The Court of Appeals affirmed the jury verdict in favor of the officers on the Count I charges under Section 1983 that plaintiff was beaten. As a matter of fact and judicial determination, plaintiff was not beaten as he claimed.

After being brought into the station that afternoon but before his release at 3:00 A.M. the next morning, plaintiff's evidence tells of various wrongs that occurred, including dousing with cold water while in his cell, failure to provide medical care and verbal abuse. (RP 1584 - 1596) While this evidence was contested vigorously by the Village and its police personnel, it may be that the jury found plaintiff's evidence to be credible on these matters. However, as the transcript of evidence will reveal, <u>there is not a scintilla of evidence to connect either Officer Argento or Officer Sansone to these acts.</u> Plaintiff did not testify that Officer Argento or Officer Sansone had any part in these activities. Officer Argento testified that once he had placed Lenard in the cell, his only further involvement with Lenard was when he returned to the

cell a few minutes later to inquire whether Lenard wanted to see a doctor, which Lenard refused. Officer Argento then went to another area of the station to complete the reports on the incident. (RP 309)[4] Officer Sansone testified that his last contact with Lenard was at the scene of the accident. (RP 503-4)[5] This evidence is unopposed.

The only activities with which Officers Argento and/or Sansone were associated, i.e., the arrest of Lenard at the scene and bringing him into the station house, have been found to be lawful. Yet

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[4]We are concurrently moving to have the report of proceedings forwarded to this Court so that the Court can note the accuracy of these statements as to the evidence.

[5]Id.

Officers Argento and Sansone find themselves facing a trial for damages resulting from a conspiracy under Section 1985 charged in Count II of plaintiff's complaint for which there is no support in the evidence as to these defendants, and even more shocking, the plaintiff may present evidence of injuries from a beating he claims to have sustained but has been judicially determined not to have happened.

The rationale offered by the Court of Appeals for this most remarkable result, if left standing, will generate confusion and injustice for years to come. The Court stated:

> While Sansone's contact with Lenard was primarily at the accident scene, Argento did place Lenard in his police car, drive him to the Melrose Park police station and escort him into the police station. There was testimony at trial that Sansone called Lenard a 'shine' to a tow truck driver at the accident scene. Lenard testified that Argento called him a 'big Black nigger'

> and hit him in the right eye and about the face with what appeared to be a stick. While the evidence does not link Argento and Sansone to all the events of January 31, there was sufficient evidence for a jury to reasonably believe that there was an overt act and circumstantial evidence of an agreement among the police, particularly Argento and Sansone, to conspire to deprive Lenard of his civil rights. Furthermore, there was sufficient evidence of racially discriminatory animus to meet the Griffin standard of §1985 conspiracies. (Appendix A., pp. 20a-21a.)

The alleged racial remarks which, if made, relate only to the element of a possible "racially discriminatory animus" but certainly do not amount to an overt act in furtherance of a conspiracy. See, e.g., Armstrong v. Borie, 494 F.Supp. 902, 906 (E.D. Pa. 1980).[6] The only other conduct alluded to by the Court of Appeals as being

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[6]With respect to the remark attributed to Sansone, it was made at the scene of the occurrence after Lenard had departed.

in furtherance of the Count II conspiracy is the alleged beating in the "right eye and about the face with what appeared to be a stick." (Appendix A., p. 21a.) This was negated by two independent witnesses and the jury verdict on Count I. With all due respect, this is a non-sequitur of the first order. The court is citing a beating that did not occur as evidence of a conspiracy to deny Lenard his civil rights. The court concedes that the evidence does not link Officers Argento and Sansone to "all the events of January 31". (Appendix A., p. 21a.) In plain fact, as recited above, there is no evidence to connect Officers Sansone and Argento to any events after Lenard was brought into the station house. Nevertheless, the court says "there was sufficient evidence for a jury to reasonably believe that there was an overt act and circumstantial evidence of

an agreement among the police, particularly Argento and Sansone to conspire to deprive Lenard of his civil rights." (Appendix A., p. 21a.) The opinion and transcript of evidence are silent as to what this evidence is, circumstantial or otherwise.

The opinion of the Court of Appeals goes on to state:

> While the jury may have found insufficient evidence of a beating, that does not mean that there was insufficient evidence of a §1985(3) conspiracy. The jury could have found that there was insufficient evidence to tie all the defendants to the alleged beating, yet enough evidence based primarily upon the injuries sustained by Lenard during his police custody, to reasonably conclude that at least Argento and Sansone had entered into and committed an act in the furtherance of a conspiracy to deny equal protection. Emphasis added. (Appendix A., p. 22a.)

The dangerous precedent established by this decision is further made apparent by the holding of the Court of Appeals that:

While the district court was correct in holding that no evidence of damage from an alleged 'beating' could be presented to the jury because of its prior decision, the district court erroneously prevented the presentation of any of the proffered evidence of injuries, medical treatment and losses caused by those injuries sustained while in police custody as they relate to the conspiracy counts. In other words, any evidence of injuries proved incurred from the time shortly after the accident to Lenard's release to his family late that evening should be admitted as they relate to being sustained while in police custody. These injuries cannot be presented or argued, however, as being the result of a beating but presented as injuries incurred somehow while under police supervision and protection. (Appendix A., p. 55a.)

The opinion goes on to state:

However, the instructions for the conspiracy damages were not isolated to a particular event but rather related to the deprivation of rights of "due course of justice" and "equal protection under the law." An award under §1985 would not be duplicative of the prosecution or the beating but, in this case, go to the finding of deprivation of civil rights while in police custody.

> See, Corriz v. Naranjo, 667 F.2d at 896-898. While courts have held that an award of damages for a state tort claim joined with a federal civil rights action would be duplicative when there is an adequate state tort remedy, Clapper v. Flynn, 605 F.2d 519, 529 (10th Cir. 1979), there are in this case, only strictly federal civil rights claims. As previously indicated, §1985 provides damages for "injury or deprivation." Thus, it is possible under §1985 to award damages for the act which effectuated the conspiracies and for the conspiracy which caused the deprivation. See, Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963). (Appendix A., pp. 59a-60a.)

Thus, the rationale of the Court's decision appears to be that because Lenard's damages, e.g., alleged humiliation at the instance of unidentified personnel at the village police station was broader then the alleged beating, the evidence of physical injuries can still come in. This interpretation of Section 1985(3) is without merit for a number of reasons. First of all, it is in direct conflict with this

Court's decision in Carey v. Piphus, 435 U.S. 249 (1977) wherein this Court recognized that as a general rule tort rules of damages should be applied in civil rights actions, and specifically noted that this principle is incorporated in 42 U.S.C. §1985(3). 435 U.S at 256 n. 10. This is apparent from the very language of Section 1985(3) which provides in relevant part that:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . in any case of conspiracy set forth in this section . . . if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby any person shall in injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of dam-

> ages occasioned by such injury or deprivation of rights and privileges against any one or more of the persons engaged in such conspiracy. . .

Thus, under the express language of Section 1985(3), there can be no liability unless the alleged conspirator commits an act in furtherance of the conspiracy which results in injury to the plaintiff. In the instant case there is no evidence that the alleged conspiracy engaged in by Officers Sansone and Argento resulted in the physical injuries sustained by plaintiff for which they alone are now being held responsible.

The apparent holding of the court below that on retrial on damages on the Section 1985(3) conspiracy count plaintiff may present evidence of the physical injuries sustained is directly contrary to the jury's finding that no beating occurred. It must be borne in mind that

according to the evidence presented, the injuries sustained by Lenard after his arrest occurred in only one of two ways, i.e., according to Lenard's testimony by an intentional beating, or according to the defendant officers' testimony, as a result of Lenard's resisting arrest. No other explanations appear in the record. the jury has rejected plaintiff's evidence by their Count I verdict. Yet the Court of Appeals holds that because these injuries were "incurred somehow" while in police custody, these officers are to have damages assessed against them. This standard makes an arresting officer an insurer of the well-being of each prisoner he lawfully arrests while that prisoner is in custody. The Court of Appeals has apparently eliminated any need for the plaintiff to prove "an act" in furtherance of a conspiracy.

In support of its holding, the Court of Appeals cites, inter alia, the rule of law that prisoners are entitled to protection from excessive use of force by police officers (Appendix A., pp. 55a-56a.) Defendants do not dispute this basic proposition of law. What is critical, however, is that this was not the theory upon which plaintiff argued his case to the jury. He claimed that his injuries were sustained as the result of an intentional beating, and this argument was expressly rejected by the jury. It is an elementary rule of law that on appeal a plaintiff may not change the theory upon which his case was presented to the jury. See, e.g., Sandford v. R.I. Coleman Realty Company, Inc., 573 F.2d 173 (4th Cir. 1978). It follows that the Court of Appeals may not sua sponte

allow the plaintiff to do so. Yet this is the apparent effect of the decision below.[7]

The Court below also asserted in support of its decision that where there is a showing of deliberate deprivation of constitutional rights while confined, a prisoner is entitled to damages. (Appendix A., p. 56a.) Again, defendants do not contest this as a general proposition of law. However, there must be some showing that for defendants to be held responsible for such deprivation they were indeed

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[7]The Court below cited in support of its decision inter alia, Corriz v. Naranjo, 667 F.2d 892 (10th Cir. 1981). In contrast to the instant case, the defendants in that case were expressly found guilty of illegal arrest and false imprisonment and it was the deprivation of plaintiff's right not to be so falsely arrested and imprisoned as to which defendants were held responsible. In contrast, in the instant case defendants' arrest and initial confinement have expressly been found to be lawful.

causally linked to it. See, e.g., Benson v. Allphin, 544 F.2d 464 (N.D.Ill. 1982). It is simply not the law, as the opinion below appears to suggest that arresting officers are responsible for anything that may happen to a prisoner once arrested and while in police custody. See, e.g., Heslip v. Lobbs, 554 F.Supp. 694 (E.D. Ark. 1982).

The gross and obvious unfairness of including evidence of such physical injuries in a retrial is that despite the fact that it has already been adjudicated that Officers Argento and Sansone are not liable for inflicting these injuries on the plaintiff, it is probable that in assessing damages on retrial a jury would view this case as though they had. Even if the jury is carefully instructed that Officers Argento and Sansone did not inflict these injuries, but rather that they

may be held responsible for them merely because they are injuries incurred somehow while under police supervision and protection will not prevent the injustice likely to result. Jurors cannot be fair when they do not know the facts. Even if it is clearly explained to a jury that Sansone and Argento were not found to have inflicted the injuries, their inclusion cannot but make jurors wonder as to why, then, they are to consider these injuries in assessing damages against these two men. After being told that the two officers have been found guilty of a "conspiracy" to deprive Lenard of his rights, such jurors are likely to assume the worst, and return an inflated and wholly unwarranted award of damages.

In any retrial on damages, evidence of physical injuries of Lenard must in law and in fairness to these individual defendants

not be permitted. As elsewhere stated, however, judgment in favor of officers Argento and Sansone should be granted instead of a retrial.

II. ATTORNEY'S FEES AND COSTS WERE IMPROPERLY AWARDED FOR THIS APPEAL

Without waiver of the foregoing, defendants assert that even if the Court's affirmance on Count II is allowed to stand, plaintiff should not be awarded fees and costs involved in this appeal.

As is apparent from the briefs filed by the defendants in this appeal and the opinion of the Court of Appeals below, this appeal by defendants was necessitated by the substantial and obvious errors found by the Court of Appeals to have been committed at trial by the district court, e.g., the submission to the jury of the three-tiered damage formula, which included the non-existent category of "substantial damages." Under these circumstances,

and in light of the results of the appeal in this matter, i.e., the success of defendants on most substantive points raised on appeal, petitioners respectfully submit that it would be contrary to the intended purposes of 42 U.S.C. §1988 and Rule 52 of the Federal Rules of Civil Procedure to award either attorney's fees or costs to respondent related to the one substantive issue on this appeal on which respondent was successful, i.e., the affirmance of the liability verdict on Count II.

Petitioners respectfully submit that in light of the foregoing, this case presents "special circumstances" which would justify a denial of an award of fees and costs. See, e.g., Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968).

While the experience of the undersigned attorneys with the trial judge in this case, aside from our strong but re-

spectful disagreement with his jury instructions, verdict forms and a number of rulings, has been such that we enjoyed participating in this case before him, as we do in other cases before him, and that we respect his integrity. Mindful that a case is not the lawyer's case, but the party's case, we have discussed in full the opinion of this Court with our clients. They bear no resentment to the particular trial judge despite their individual feelings as to some of the rulings made by that judge but are fearful that that judge's views as to the application of the law to the facts of this case, being very different from the Appeal Court's unanimous opinion, which they have read, is such that they question the need for the removal of the Seventh Circuit Rule 18, which has been explained to them. While they are fearful of causing an unfavorable impression with said trial

judge with this request, they request that this Court order that Seventh Circuit Rule 18 not be eliminated in this case so that the judicial selection will take its normal course rather than structuring this case's return to the same trial judge if any retrial is to be had.

## CONCLUSION

For the reasons stated, petitioners respectfully ask this Court to proceed as follows:

1. To reverse the 7th Circuit U.S. Court of Appeals and rule that Count II, the alleged conspiracy, based on 42 U.S.C. 1985(3) be dismissed, the key reason for which, being that the only conspiracy (even arguendo) shown by the evidence was no broader than to commit the acts for which petitioner's Argento and Sansone have been found by the jury to be not guilty, i.e., of denying Lenard's civil

rights by beating. This, it is noted was conceded by one of Lenard's trial counsel.

2. Without prejudice to the foregoing, in the event the Court does not proceed as prayed for in the preceding paragraph, to rule that in any retrial on the issue of damages that the physical injuries received in the beating alleged but judicially found not to have occurred, cannot be utilized as evidence nor for argument for the reasons stated in the petition.

3. Without prejudice to the foregoing, that in the event the Court does not proceed as prayed for in the two preceding paragraphs, to set forth any cautionary and guideline conditions that should govern any retrial, specifically what warnings should accompany the jury instructions and evidence, if any, as to injuries to be permitted, and rule with

respect to the appropriateness of fees for the representation of Lenard, including the denial of all fees in appellate tribunals for the reasons that all appellate activity has been made necessary due to the erroneous rulings of the trial court which were not the fault nor responsibility of these petitioners and that for the reasons stated, that the Court of Appeals suspension of 7th Circuit Rule 18 not be permitted.

4. To note that the listing of the above alternatives is made in discharge of the duty of the undersigned as lawyers but is not intended in derogation of the committment to the relief prayed for in paragraph no. 1.

Respectfully submitted,

John G. Poust
Counsel of Record

Stephen E. Sward

Christine M. Wheelock

John G. Poust
Stephen E. Sward
Christine M. Wheelock
ROOKS, PITTS, FULLAGAR AND POUST
55 West Monore Street, #1500
Chicago, Illinois 60603
(312) 372-5600

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Nos. 80-2602, 80-2666,
81-2036, 81-2434

BENNIE LENARD,

Plaintiff-Appellee,
Cross-Appellant,

v.

ROBERT ARGENTO & JOSEPH SANSONE,

Defendants-Appellants,

v.

VILLAGE OF MELROSE PARK,

Defendant-Appellee.

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Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division. No. 77 C 1208
Joel M. Flaum, Judge.

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ARGUED NOVEMBER 10, 1981 -
DECIDED FEBRUARY 1, 1983

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Before PELL, Circuit Judge, CUDAHY, Circuit Judge, and GRANT, Senior District Judge.*

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* Honorable Robert A. Grant, Senior District Judge of the United States District Court for the Northern District of Indiana, sitting by designation.

GRANT, Senior District Judge. This case arises from the events of January 31, 1977 involving plaintiff-appellee, Bennie Lenard, and several police officers of the Village of Melrose Park, Illinois. The particular events of the case are disputed but we will attempt to provide a fair summary of the facts.

Lenard, a 41 year old black mechanic, discovered when he left work at 7:00 a.m. on January 31 that his car had a flat tire. While waiting for the spare tire to be repaired, he and a co-worker went to a neighborhood bar where Lenard consumed two shots of vodka and two glasses of beer. After changing the tire, Lenard returned to the bar where he consumed in a 2 to 2 1/2 hour period two more shots of vodka and three glasses of beer. He had nothing to eat during this time. About 1:00 p.m., Lenard and his co-worker left the bar to go to the co-worker's home, each driving his

own vehicle. While en route, Lenard collided with a car driven by Andrea Dreyer, a defendant in the district court trial but not a party in this appeal. There is a dispute whether Lenard's car crossed the center line and struck Dreyer's vehicle.

The damage to each car was minor but the drivers quarreled regarding fault. Dreyer, in her deposition, admitted shouting vulgarities at Lenard. Witnesses, including a passenger in the Dreyer car, testified Lenard appeared drunk and that he struck Dreyer's shoulder with his fist and grabbed her. The Melrose Park police were called with Officer Joseph Sansone the first to arrive at the accident scene. Officer Robert Argento arrived several minutes later.

Lenard was arrested for drunk driving and several other traffic offenses. A scuffle occurred while the officers tried

to handcuff Lenard and place him in Argento's squad car. Lenard contends he was beaten by Argento with his nightstick while in the squad car and knocked unconscious. Argento searched Lenard's car after the arrest and discovered a handgun and an opened half can of beer.

After his arrest, Argento drove Lenard to the Melrose Park police station where Lenard contends he was further kicked, beaten and called a "black nigger." His next memory is that of lying on the wet floor of a cell in his underwear in extreme pain and cold. He requested to go to a hospital but someone said: "Leave him alone. He doesn't want to go to the hospital." Lenard was unable to identify any of the officers because of his facial injuries. Lenard remained in custody at the Melrose Park police station until late that evening. During the evening while

Lenard was still in a cell in the Melrose Park police station, Floydell Henning (Lenard's stepson) testified he heard racial slurs, i.e., "Chicken George," over the loudspeaker in the station. He could not identify the parties involved. At one point while still in police custody, Lenard was brought to the Westlake Community Hospital where he was treated for his injuries and returned to the police. Lenard complains that his family came to the jail on three occasions that evening before his release was finally obtained. Lenard was hospitalized for his injuries for 39 days and later underwent surgery for the injuries. There was medical testimony at trial that he suffered permanent sight impairment from his injuries.

Officers Argento and Sansone deny that Lenard was beaten at any time with clubs or

anything else. Two witnesses present at the accident scene testified that they did not see Lenard beaten. The police contend that an altercation occurred in the icy police station parking lot while attempting to remove Lenard from the squad car. Because of his size (6'3", 260 pounds) and drunken condition, three officers, Argento, Culotta and Zito, were necessary to remove him from the car. The officers testified that Lenard swore at them and resisted being taken into the police station. The officers further contend that Lenard repeatedly fell in the icy lot and on the stairway of the station because of his constant struggling. They deny that any beating occurred and maintained Lenard's injuries occurred while resisting his removal into the police station.

Lenard was charged with the following state offenses: driving while under the

influence of intoxicating beverage; improper traffic lane usage; failure to reduce speed to avoid an accident; battery; transportation or possession of alcoholic liquor; possession of a firearm without a firearm identification car; unlawful transportation or use of weapons; resisting a police officer and driving without a valid driver's license.

A jury convicted Lenard of the petty offense of transportation of alcoholic liquor, Ill.Rev.Stat. 1977, Ch. 95 1/2, par. 11-502, and acquitted him on all other charges. The transportation conviction was subsequently reversed and remanded by the Illinois Appellate Court because of the trial court's refusal to allow Lenard to cross-examine the police officers for impeachment purposes. People v. Lenard, 79 Ill.App.3d 1046, 398 N.E.2d 1054 (1979). In dicta, however, the court did

state that "[t]he evidence adduced was ample to sustain defendant's conviction." Id. at 1058.

Lenard initiated this action in a five-count complaint pursuant to several sections of the Civil Rights Act of 1871, 42 U.S.C. §§1983, 1985 and 1988. The named defendants included the Village of Melrose Park, Robert Argento, Joseph Sansone, Bruce Culotta, George Zito, Andrea Dreyer, Dr. T. Mehrpuyan and Westlake Community Hospital. Westlake Hospital and Dr. Mehrpuyan reached a settlement with Lenard and they, along with Count IV of the Complaint, were dismissed from the suit. Count I of the Second Amended Complaint charged Police Officers Argento, Sansone, Culotta and Zito with violating 42 U.S.C.

§1983[1] by beating Lenard. Count II charged these same officers with conspiracy to deprive equal protection of the law by use of brutal and excessive force on Lenard in violation of 42 U.S.C. §1985(3)[2] and the

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[1] 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] 42 U.S.C. §1985(3) provides:

> (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to

(continued on next page)

Village of Melrose Park for failure to properly screen, hire, train and supervise its police employees in violation of 42 U.S.C. §§1983 and 1985. Count III charged conspiracy to impede, obstruct and defeat the due course of justice with intent to deny equal protection in violation of 42

(continued)

prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully entitled qualified persons as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

U.S.C. § 1985(2)[3]. So charged under Count III were the Village of Melrose Park, Argento, Sansone, Culotta, Zito, Dreyer, Westlake Community Hospital and Dr. T. Mehrpuyan (the latter two were dismissed before trial). Count V charged Argento, Sansone and Dreyer with malicious prosecution for the charges resulting from the

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[3] 42 U.S.C. §1985(2) provides:

> (2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

traffic accident and arrest, thereby depriving Lenard of his civil rights under 42 U.S.C. §1983.

Bifurcated trials lasting five weeks were held on liability and damages in February and March, 1980. A default judgment was entered against defendant Dreyer. In the liability phase of the trial, the jury returned a verdict for all the defendants on the "beating" charge of Count I. However, the jury found for Lenard on the two conspiracy charges of Counts II and III and the malicious prosecution charge of Count V against Argento and Sansone only. In the damage portion of the trial, Lenard was prohibited from presenting any damages resulting from the "beating" because the jury found no "beating" under Count I.[4] No

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[4] "THE COURT: To the extent that the proffer relates to injuries dericed [sic] as a result of the incident of 1/31/77, this Court, in light of the jury's verdicts in this case, would preclude a presentation of such evidence, if it relates, as has been described by Mr. Bertucci. And the prof-

(continued on next page)

other evidence of damages was presented by Lenard. Over defense objection, the jury was given a three-tier jury verdict form by the trial judge and instructions relating to possible damages under that form. The jury returned a finding of $10,000 actual and compensatory damages, $125,000 "substantial damages" and $150,000 punitive damages against Argento and $75,000 punitive damages against Sansone.

The Village of Melrose Park, Argento and Sansone raise four issues on this appeal. First, whether the district court's use of a three-tier damage verdict form and its damage instructions which stressed "substantial damages" were erroneous. Second, whether the amount of damages awarded by the jury is against the

(continued)

fer, of course, may stand and objection to the Court excluding it may stand; and in light of the Court's earlier comments, as well as these, would rule that inadmissible for submission to the jury for consideration in a damage phase of the trial." (Tr. 2308).

manifest weight of evidence and excessive as a matter of law. Third, whether there was ample evidence to establish a good faith belief in the officers for probable cause to arrest Lenard and prosecute the criminal charges requiring a directed verdict for the defendants on the malicious prosecution charge of Count V. Fourth, whether a conspiracy without an overt act can be the basis of a damage award or whether there can be a duplication of an award for conspiracy when damages have been already awarded for the act.

On cross-appeal, Lenard raises several issues. First, whether the trial court erred in permitting a good faith immunity defense to be asserted by the Village of Melrose Park. Second, whether the trial court erred in not specifically mentioning Lenard's claim of a beating in its verdict form. Third, whether the jury verdict for the "beating" count was against the mani-

fest weight of the evidence. Claims are also raised regarding attorneys' fees and costs under 42 U.S.C. §1988, 28 U.S.C. §1920 and Fed. R. Civ. P. 54(d). Both Lenard and the defendants raise other claims of error, including arguments of various counsel, instructions to the jury and the district court's judgments on Motions in Limine. Each will be addressed individually.

## II. Liability

### a. Police Officers

Count I of the Second Amended Complaint alleged that the four named police officers beat Lenard while he was in police custody in violation of his civil rights. This beating was the seminal issue of the entire case. Lenard testified that he was cursed and struck by Argento after he was placed in the backseat of Argento's squad car. Lenard contends that he was struck about his head and right eye with

what appeared to be a stick. After being knocked unconscious, Lenard testified his next recollection was that of sitting in the squad car as it pulled up to the police station and hearing Argento tell someone "I got a big Black nigger." He testified that he was grabbed about the neck and pulled from the car. He fell to his knees and was kicked and beaten. Lenard's next memory is that of being in a cold wet cell in his underwear. Lenard could not identify any of the officers involved because of his facial injuries.

Several witnesses at the accident scene testified that they did not see Lenard being beaten. Officers Argento, Zito and Culotta testified Lenard was injured in two falls in the icy parking lot and by a fall on the stairwell in the police station. These officers testified that Lenard was struggling and resisting his removal into the station. His size,

drunken condition, his struggling, the physical weather conditions all contributed to the falls. The jury, after hearing all the testimony, returned a verdict that Lenard was not beaten.

While there is clearly a conflict of testimony, the question of credibility and weight of the evidence is within the purview of the jury. Pinkowski v. Sherman Hotel, 313 F.2d 190, 193 (7th Cir. 1963). A jury verdict cannot be lightly set aside so long as it has a reasonable basis on the record. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969); Wyant v. J.I. Case Co., 633 F.2d 1254, 1256 (7th Cir. 1980). Viewing the evidence in a light most favorable to the defendants, the prevailing parties, (Smith v. Rogers, 290 F.2d 601, 602 (7th Cir. 1961)), there was a reasonable basis in the record for the jury verdict and the evidence will not be reweighted. Rupe v.

Spector Freight Systems, Inc., 679 F.2d 685, 697 (7th Cir. 1982) (Judge Swygert dissenting); Musgrave v. Union Carbide Corp., 493 F.2d 224, 229 (7th Cir. 1974). The jury determination that Lenard was not beaten will not be disturbed.

Counts II and III of the complaint charged the named officers with violation of §§1985(2) and (3). The jury found, however, only Argento and Sansone liable for civil rights conspiracy. Argento and Sansone argue that they cannot be liable for a conspiracy to "beat" when the jury found that there was no "beating". However, the charge given to the jury was not a "conspiracy to perform a beating" but rather a conspiracy to deprive [Lenard] due course of justice and equal protection of the law. (Tr. 2202-03).

As this court outlined in Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), rev'd in part on other grounds, 446 U.S.

754 (1980):

> A civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage'." Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973) (citation omitted).

* * *

A plaintiff seeking redress need not prove that each participant in a conspiracy knew the "exact limits of the illegal plan or the identity of all participants therein." Hoffman-LaRoche, Inc., supra, 447 F.2d [872 (7th Cir. 1971)] at 875. An express agreement among all the conspirators is not a necessary element of a civil conspiracy. The participants in the conspiracy must share the general conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective or possess the same motives for desiring the intended conspiratorial result. To demonstrate the existence of a conspiratorial agreement, it simply must be shown that there was "a single plan, the essential nature and general scope of which [was]

> known to each person who is to be held responsible for its consequences." Id.

600 F.2d at 620-21.

Thus, there cannot be a civil cause of action for conspiracy under §1985 without an overt act. Williams v. St. Joseph Hospital, 629 F.2d 448, 451 n.3 (7th Cir. 1980). "[i]t is the overt act which moves the conspiracy from the area of thought and conversation into action and causes the civil injury and resulting damage." Hoffman v. Halden, 268 F.2d 280, 295 (9th Cir. 1959), overruled in part on other grounds, Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962).

While Sansone's contact with Lenard was primarily at the accident scene, Argento did place Lenard in his police car, drive him to the Melrose Park police station and escort him into the police station. There was testimony at trial that Sansone called Lenard a "shine" to a tow

truck driver at the accident scene. Lenard testified that Argento called him a "big Black nigger" and hit him in the right eye and about the face with what appeared to be a stick. While the evidence does not link Argento and Sansone to all the events of January 31, there was sufficient evidence for a jury to reasonably believe that there was an overt act and circumstantial evidence of an agreement among the police, particularly Argento and Sansone, to conspire to deprive Lenard of his civil rights. Furthermore, there was sufficient evidence of racially discriminatory animus to meet the Griffin standard for §1985 conspiracies.

> The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by law to all.

Griffin v. Breckenridge, 402 U.S. 88, 102 (1970) (footnotes omitted) (emphasis in original). See also Murphy v. Mount Carmel High School, 543 F.2d 1189, 1192 n.1 (7th Cir. 1976); Potenze v. Schoessling, 541 F.2d 670, 672 (7th Cir. 1976); Lessner v. Braniff Airways, Inc., 518 F.2d 538, 540 (7th Cir. 1975).

While the jury may have found insufficient evidence of a beating, that does not mean that there was insufficient evidence of a §1985(3) conspiracy. The jury could have found that there was insufficient evidence to tie all the defendants to the alleged beating, yet enough evidence, based primarily upon the injuries sustained by Lenard during his police custody, to reasonably conclude that at least Argento and Sansone had entered into and committed "an act" in the furtherance of a conspiracy to deny equal protection.

As pointed out in Hoffman-LaRoche, Inc. v. Greenberg, 447 F.2d 872, 875 (7th Cir. 1971):

> . . . [c]ircumstantial evidence may provide adequate proof of conspiracy. The law does not demand proof that each conspirator knew the exact limits of the illegal plan or the identity of all participants therein.

Thus, while the jury determined that the evidence did not support the finding of a beating, there was a determination of sufficient evidence to find a conspiracy to deprive equal protection.

> In such a situation, "it is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts'." [Citing Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 700-01 (1962).]

Hampton v. Hanrahan, 600 F.2d at 621. From a review of the facts and record in this case, it was not unreasonable for this jury to reach the verdicts regarding Counts I and II.

Count III specifically alleged that the named officers conspired together with the purpose of impeding, obstructing, hindering and defeating the due course of justice and to deprive Lenard of equal protection of the law. This count is complementary to Count V of the Complaint charging malicious prosecution. All parties agree that Count III goes to a conspiracy to maliciously prosecute Lenard for the traffic, liquor and gun violations. In light of our holding regarding the malicious prosecution charge, infra, we must reverse the jury verdict on Count III for failure of an act implementing the conspiracy.

In his Second Amended Complaint, Lenard charged in Count V that Argento, Sansone and Dreyer denied him his rights to be free from malicious prosecution under color of law in violation of §1983. This court has held that under a charge of a §1983 violation, the test is ". . . not

whether the arrest was constitutional or unconstitutional or whether it was made with or without probable cause, but whether the officer believed in good faith that the arrest was made with probable cause and whether that belief was reasonable." Brubaker v. King, 505 F.2d 534, 536-37 (7th Cir. 1974). See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972), on remand from 403 U.S. 388 (1971).[5] See

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[5] Therefore, to prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable. And so we hold that it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted. We think, as a matter of constitutional law and as a matter of common sense, a law enforcement officer is entitled to this protection.

456 F.2d at 1348.

also Terket v. Lund, 623 F.2d 29, 31 (7th Cir. 1980)(Lack of probable cause and malice must be shown. Actual existence of probable cause is an absolute bar to a §1983 action); Boscarino v. Nelson, 518 F.2d 879 (7th Cir. 1975); Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974).

The question then is whether Officers Argento and Sansone arrested Lenard with good faith belief that there was probable cause for the arrest and whether that belief was reasonable. The Supreme Court has held that:

> [t]he quantum of information which constitutes probable cause--evidence which would "warrant a man of reasonable caution in the belief" that a felony has been committed, Carroll v. United States, 267 U.S. 132, 162--must be measured by the facts of the particular case.

Wong Sun v. United States, 371 U.S. 471, 479 (1962). This court has held in United States v. Ganter, 436 F.2d 364, 368 (7th Cir. 1970), that:

> The determination of probable cause does not rest upon a technical framework; instead it depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Brinegar v. United States, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949). "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." Henry v. United States, 361 U.S. 98, 102, 80 S.Ct. 168, 171 4 L.Ed.2d 134 (1959); Thornton v. Buchmann, 392 F.2d 870, 872-73 (7th Cir. 1968).

See also United States v. Watson, 587 F.2d 365, 368 (7th Cir. 1978).

In examining the particulars of this case, it is undisputed that Lenard consumed four shots of vodka and five glasses of beer in a period of 5-6 hours while eating nothing and that while driving his automobile he became involved in a minor auto accident. Both officers were called to the scene to investigate the accident when a dispute over fault arose. While the

offenses did not occur in the presence of the officers, they arrived upon the scene shortly thereafter. Testimony at trial indicated that Dreyer complained that Lenard has crossed the center line and struck her car. Upon the basis of this information and Lenard's appearance at the scene, it would be reasonable for the officers to have a good faith belief that there existed probable cause to arrest Lenard on the traffic violations. While at the scene, Officer Argento, during a search of Lenard's car, discovered the firearm on the seat and the open can of beer. This Court does not lightly set aside this jury verdict but under the facts which were before the officers, we find that there was probable cause for Lenard's arrest for gun possession and liquor possession, and that it was reasonable for Argento and Sansone to have a good faith belief in the probable cause. We reverse the finding of malicious

prosecution and the finding of conspiracy to obstruct justice dependent upon this prosecution.

b. Village of Melrose Park

Count II of the Complaint alleged:

> 44. Defendant "Village" by its policy and custom of failing to properly screen, hire, train and supervise its police employees encouraged and sanctioned the misbehavior complained of herein, with the knowledge that it would deprive plaintiff of his rights, privileges and immunities, including Equal Protection of the Laws.

(R. 95).

Count III of the Complaint charged that it was the policy of the Village to encourage, sanction and "cover-up" acts of misconduct by its police employees. The count specifically alleges that the internal investigation ordered by the Chief of Police was conducted solely to disprove Lenard's allegations and cover-up the police misconduct. Lenard further alleges that the policy and practice of the Village

to encourage, sanction and conceal unlawful acts by its police employees was so broad and pervasive that it encompassed a large number of the police department including the Chief from the time of the incident to the present day.

Liability of municipalities must be based on something more than a mere right to control employees. A "municipality cannot be held liable under §1983 on a respondeat superior theory." Monell v. New York City Department of Social Services, 436 U.S. 658, 691 (1977). As the Supreme Court held in Rizzo v. Goode, 423 U.S. 362, 371 (1975), there must be an "affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners--express or otherwise--showing their authorization or approval of such misconduct." The Court in Rizzo further held that the "failure to act in the face

of a statistical pattern" of police misconduct was not sufficient to base liability on the City of Philadelphia. 423 U.S. at 376. In Monell there was this same requirement of showing an implementation or execution of a governmental policy before municipal liability could be imposed. The resulting case law from Rizzo finds ". . . that a failure of a supervisory official to supervise, control, or train the offending individual officers is not actionable absent a showing that the official either encourgaged the specific incident of misconduct or in some way directly participated in it." Hays v. Jefferson County, Ky., 668 F.2d 869, 874 (6th Cir. 1982), cert. denied, _____ U.S. _____, 51 U.S.L.W. 3254 (U.S. Oct. 5, 1982). At a minimum, a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct

of the offending officers. Id. Inaction by the Village officials would also not attach liability. There can be liability only when there is an extremely high degree of culpability for inaction. The Second Circuit has held:

> . . . a mere failure by the county to supervise its employees would not be sufficient to hold it liable under §1983. However, the county could be held liable if the failure to supervise or the lack of a proper training program was so severe as to reach the level of "gross negligence" or "deliberate indifference" to the deprivation of the plaintiff's constitutional rights.

Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir.), cert. denied, 444 U.S. 980 (1979) (citation omitted). Only where there is a pattern of constitutionally offensive acts with failure to invoke remedial measures will there result in municipal liability for subsequent violations "if the supervisor's inaction amounts to deliberate indifference or tacit authorization of the

offensive acts." Turpin v. Mailet, 619 F.2d 196, 201 (2d Cir. 1980). Until this present case, this court has not addressed these liability holdings of Monell or Rizzo, though they have been relied upon in Spriggs v. City of Chicago, 523 F.Supp. 138, 142 (N.D.Ill. 1981) and Jordan v. City of Chicago, Department of Police, 505 F.Supp. 1 (N.D.Ill. 1980).

After an examination of approximately 2400 pages of transcript, we find insufficient evidence to establish a failure by the Village to properly screen, hire, train and supervise its employees. Defendant Argento was a police officer for another community before his employment by Melrose Park. He and Sansone attended the Chicago Police Academy after employment. While Chief of Police Cimino had received no formal police training, he was a veteran of thirty years on the police force. Chief Cimino, during direct examination, testi-

fied that his officers did receive training on physical restraint of prisoners. The identity of those officers was not pursued by Lenard's counsel. Several other officers, including defendants Culotta and Zito, testified but were not questioned by Lenard regarding their police training.

The Village of Melrose Park did not have to establish at the time of this incident a system of internal investigation nor written regulations regarding treatment of prisoners or the use of nightsticks. Directions, department policy and instructions were transmitted by word of mouth via meetings with staff officers every three months or general whole department meetings held twice a year. Nightsticks are issued to the officers only one week a year during a community feast and returned to the department at the end of that week. They were not standard uniform equipment requiring continual

restraining.

Chief Cimino testified that on several occasions over eleven years the FBI had questioned officers regarding complaints but nothing ever became of those incidents. When a citizen complaint came to the attention of the Chief, he looked into the matter and talked the matter out with the officer and the complainant. For a small community, this personal approach to a community problem seems reasonable. The internal investigation regarding the Lenard incident was the first that Chief Cimino felt a need to order. The investigation was conducted by Officer Carpino and no disciplinary action resulted from this investigation. The investigation was still open at the time of trial.

Lenard argues that the investigation was conducted to disprove his allegations and cover-up police misconduct. We found no evidence to support these allegations.

Officer Carpino did read at trial from a police report one line of which read "disprove allegation by the defendant and Lenard was charged with DWI" (Tr. 1295). However, when asked what was the purpose of the investigation, Carpino's reply was "to corroborate or contradict any of the evidence, whichever it may be, regardless to where it led." (Tr. 1297).

In light of the standard outlined in Monell, supra, Rizzo, supra and Turpin, supra, the review of the evidence in this case clearly did not reveal sufficient evidence that a reasonable man would return a contrary verdict regarding Count II or Count III in regard to the Village of Melrose Park. Most definitely the evidence did not rise to the standard of liability necessary under Rizzo and its progeny.

Similarly, there was not sufficient evidence to show a conspiracy on the part

of the Village or its officials with the police officers or defendant Dreyer. The evidence did not show a custom or practice upon the part of the Village or through its officials with its police officers to deprive certain citizens of their constitutional rights through the use of physical force or criminal prosecution. From a reading of Andrea Dreyer's deposition entered into the record at trial, she had four contacts with the Melrose Park police--the day of the accident, the following day when she filed a battery complaint and two telephone conversations after Lenard filed suit. The only possible conspiracy would have been in regard to the accident report and the battery charge. But there was no reasonable basis for the Village to have refused to pursue the complaints of a citizen relating to this accident or the battery charge filed. There was no evidence to show that the Village

provoked the complaint filed by Dreyer.

The presence of the Village attorney during an interview of Argento, Sansone and Culotta by State's Attorney Kling on February 14, 1977 and the Village attorney's restrictions upon that interview, appear to be no more than legal counseling of Village employees during an admittedly unofficial investigation rather than a cover-up. The Village cooperated with the State's Attorney's office providing statements in its possession. The officers even took Kling to the accident scene and reviewed the events with him. Before a complaint was filed by Lenard and on the basis of newspaper articles alone, Chief Cimino initiated the first internal investigation of police officers in Melrose Park. While Lenard chooses to see conspiracy in these activities, we see none.

It should be pointed out that Lenard argues on appeal that the trial court erred

when it instructed the jury regarding good faith immunity defense accorded the Village. At the time this trial was conducted, municipalities possessed a qualified immunity under Monell v. New York, supra, through the trial court was aware of pending action in the Supreme Court on this issue. (Tr. 1739-40, 1743). Six weeks after the conclusion of the trial, the Supreme Court held municipalities have no immmunity from liability under 42 U.S.C. §1983 for their constitutional violations, and that they may not assert the good faith of their officers as a defense. Owens v. City of Independence, Mo., 445 U.S. 622 (1980). On appellate review, we would ordinarily be obligated to apply the law as of the time of the appeal versus as of the time of trial. National Labor Relations Board v. Food Store Employees Union, Local 347, 417 U.S. 1, 10 n.10 (1974); Bradley v. Richmond School Board, 416 U.S. 696

(1974); Rey v. Rutherford, 645 F.2d 880, 883 (10th Cir. 1981), but we need not address the issue of the jury instruction in this case.

At the close of Lenard's case and at the close of all the evidence, the Village moved for a Directed Verdict which was reserved by the district court. The jury then returned verdicts in favor of the Village as to all alleged violations. Notwithstanding the jury verdict, after the close of the trial, the district court granted the Village's Motion for a Directed Verdict effective as of the close of the evidence. (Corrected Judgment was entered October 3, 1980 [R.277]).[6] Thus,

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[6] "Today the court has amended its Judgment dated March 19, 1980 which mistakenly entered judgment upon the jury's verdict in favor of the Village of Melrose Park and has entered judgment on its order granting the motion of the Village of Melrose Park for a directed verdict at the close of all the evidence." Footnote to Memorandum Opinion October 3, 1980. (R. 281).

the issue on appeal is not whether the trial court erred in granting a Directed Verdict in favor of the Village. The Directed Verdict took the judgment from the jury and made it that of the court.

The standard for a Directed Verdict was recently stated by this Court in Richardson v. City of Indianapolis, 658 F.2d 494, 498 (7th Cir. 1981). It was stated that:

> . . . the trial judge must determine whether the part with the burden of proof has produced sufficient evidence upon which a jury could properly proceed to a verdict, and that a mere scintilla of evidence will not suffice. Hohmann v. Packard Instrument Co., 471 F.2d 815, 819 (7th Cir. 1973). Thus on appeal the party against whom a verdict has been directed has the onus of demonstrating the existence of a conflict in the evidence or the inferences to be drawn therefrom sufficient to justify submission of the question to the jury. Krivo Industrial Supply Co. v. National Distillers & Chemical Corp., 483 F.2d 1098, 1102 (5th Cir. 1973).

While it might be argued that the trial court could have been influenced in its judgment by the defense of qualified immunity, such an argument would not reverse the trial court's decision but only require a remand for a clarification of its decision. In the normal orderly and efficient administration of justice, priority consideration should be given to issues which will dispose of litigation over issues which, if sustained, will require remand and retrial. Otten v. Stonewall Insurance Co., 538 F.2d 210, 213 (8th Cir. 1976). From this record, we feel a remand is not necessary.

Lenard argues the sufficiency of the evidence against the Village and requested a reversal of the verdict and judgment, but no post-trial motions, i.e., judgment n.o.v. or motion for retrial, were made. Such failure limits the relief available from the appellate court to that of

possibly ordering a new trial. Cone v. West Virginia Pulp and Paper Co., 330 U.S. 212 (1947); 5A Moore's Federal Practice ¶50.12 (2d ed. 1981). Defendants Argento and Sansone made several post-trial motions, including a motion for new trial. These motions were denied. From our review of the record, we fail to find sufficient evidence that would cause a reasonable man to return a contrary verdict. Smith v. J.C. Penney Co., 261 F.2d 218, 219 (7th Cir. 1958). We sustain the Directed Verdict for the Village of Melrose Park.

II. Damages

a. "Substantial"

As previously discussed, all the defendants, the Village of Melrose Park, Argento, Sansone, Zito and Culotta, were found not guilty by the jury of the alleged beating of Lenard. The jury also found the Village of Melrose Park, Zito and Culotta not guilty under Counts II and III. The

jury did, however, find for Lenard against Argento and Sansone on both Counts II and III. The jury also found the two officers liable for malicious prosecution.

When the trial court instructed the jury on the "damage" portion of the verdict, they were instructed that they could award "substantial damages" for both conspiracies without proof of actual injury. If the jury found malicious or wanton conduct in regard to the conspiracies, the jury was instructed that they could award punitive damages in addition to the award of "substantial damages." If the jury found that Lenard had sustained actual or compensatory damages from the malicious prosecution, the jury was instructed to award such damages to Lenard. If Lenard had not sustained any actual damages, they were instructed to award a nominal sum. They were also instructed that punitive damages could be awarded if they found by a

preponderance of the evidence "that the acts and conduct of the defendants toward the plaintiff were maliciously done." (R. 2382).

The trial court went on to further explain the three types of damages upon which they had been instructed. Actual damages represented any direct out-of-pocket expenses Lenard sustained because of the defendants' acts and conduct. The trial court viewed "substantial damages" as a category presumed to flow from every conspiracy to obstruct justice or deprivation of equal protection.[7] It was seen as

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[7] "Substantial damages, as I have described in these instructions, are those which are presumed to flow from every conspiracy to obstruct justice, and every conspiracy to deprive plaintiff of equal protection of the laws or of equal privilege or immunity under the laws. It is for you to determine the amount of the substantial damages, as it is for you to determine the amount of the actual damages." (Tr. 2385).

a category separate from actual damages or punitive. This Court finds that it was error to instruct the jury as to a separate and distinct category of damages classified as "substantial damages."

In Carey v. Piphus, 545 F.2d 30 (7th Cir. 1976), rev'd 435 U.S. 247 (1977), the Supreme Court reversed the position of this court regarding the awarding of damages to students who were suspended from public elementary and secondary schools without procedural due process. We had held that the students were entitled to recover substantial non-punitive damages in the absence of proof of actual injury caused by the denial of procedural due process. The Supreme Court held "that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights." 435 U.S. at 266. Carey was

limited to procedural due process violations rather than the substantive constitutional violations of this case.

When the Court overruled the holding in Carey, it refrained from overruling the line of cases upon which this court had based Carey. The Supreme Court held:

> . . .the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another. As we have said, supra, at 258-259, these issues must be considered with reference to the nature of the interests protected by the particular constitutional right in question.

435 U.S. at 264-65. As recently pointed out in this court by Justice Stewart, retired, sitting by designation in Owen v. Lash, 682 F.2d 648 (7th Cir. 1982), several courts have considered the question of awarding compensatory damages for substantive constitutional violations in the absence of consequential injury. Several

of the courts, under the circumstances of their particular case and the nature of the constitutional violations, found damages could "be presumed where there is an infringement of a substantive constitutional right." Williams v. Trans World Airlines, Inc., 660 F.2d 1267, 1272 (8th Cir. 1981). See also Owen v. Lash, 682 F.2d at 657-59. Examining the circumstances of this case and the substantive constitutional issues, it was proper for the jury to consider and award damages for these violations in the absence of discernible consequential injuries.

There is no question that Lenard is entitled to a damage award for a violation of 42 U.S.C. §1985(3). Such a right to damages is provided for within §1985(3). This court, however, does not find that there is a separate category of damages known as "substantial damages" which flow from civil rights violations. While it is

recognized that courts must exercise creativity in fashioning remedies for violations of constitutional rights, we are mindful of the Supreme Court's instruction in Carey that:

> . . . the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question--just as the common law rules of damages themselves were defined by the interests protected in the various branches of tort law.

435 U.S. 247, 259 (1977). While the Court in Carey made several references to "substantial damages" or "substantial nonpunitive damages,"[8] it is our reading that the word "substantial" was used as an adjective modifying the noun "damages" and not as a descriptive phrase alluding to a category of damages. Classification of damages as actual or compensatory, nominal and punitive are terms of art which have a substantive meaning in legal jurispru-

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[8] See 435 U.S. at 252, 253, 254, 261, 266.

dence. "Substantial" is an adjective modifying damages and conveys no legal meaning. Rather, it gives a quantitative character to the damages.

We cannot but feel that the repeated use of the phrase "substantial damages" by the district court (11 times, plus inclusion as a category in the verdict form) in its instructions to the jury and the instruction that such damages could be awarded without proof of actual injury greatly influenced this large verdict. "Repetitious instructions which place undue emphasis on matters favorable to either side constitute reversible error." Flentie v. American Community Stores, Corp., 389 F.2d 80, 83 (8th Cir. 1968). In light of the erroneous use of the term "substantial" in the verdict form and the instructions in keeping with that form, we reverse and remand this case for retrial on the issue of damages.

b. Punitive

Additionally the award of $150,000 and $75,000 in punitive damages against Argento and Sansone, respectively, without a showing as to which claim, the conspiracies or the malicious prosecution, the award as assigned or apportioned requires remand in this instance. Federal law governs the right to punitive damages in civil rights violations. Basista v. Weir, 340 F.2d 74 (3d Cir. 1965). To warrant an award of punitive damages, it must be demonstrated that "there was a degree of willful and wanton disregard of plaintiff's right not to suffer this sort of discrimination." Seaton v. Sky Realty Co., Inc., 491 F.2d 634, 638 (7th Cir. 1974). Because of our holding on the issue of malicious prosecution, supra, and the single sum award of punitive damages, we cannot apportion the award among the

counts of the complaint. Punitive damages may be awarded to punish a defendant for his outrageous conduct but also to deter the defendant and others from engaging in the same or similar conduct. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); see also City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981); W. Prosser, Law of Torts, §2 at p.9 (4th ed. 1971). Damages should not go beyond deterrence and become a windfall.

c. Damage evidence that can be presented

Several issues were raised on appeal regarding damages and evidence regarding damages which we will consider in order to guide the district court in the retrial.

The district court below held that no evidence in the damage portion of the trial could be introduced regarding the "beating" as the jury found no "actual" beating had occurred. The district court instructed Lenard's counsel that:

THE COURT: That is not what the Court is saying. I am saying any evidence that flows from the damages resulting from Mr. Lenard being maliciously prosecuted or conspired against may come in; but on the 1983 charge, of having been beaten or the use of excessive force and deprivation of his constitutional rights, that I am precluding.

The Court feels it has no choice, in light of the jury's verdict. If you feel I read the jury's verdict incorrectly, then, of course, you make the exception you have and call for a mistrial. But I feel there is no other choice.

* * *

THE COURT: So the record is clear, Mr. Bertucci, there can be no reference to a cover-up of a beating which I state for the record the Court has concluded that the verdict has been returned that that proof has not been established by a preponderance of the evidence.

MR. BERTUCCI: What I want to know, your Honor--

THE COURT: You are limited in that, that is correct.

MR. BERTUCCI: But what can I say the conspiracy was?

> THE COURT: Whatever conduct, other than the beating, which was alleged to have occurred in this case you feel occurred, any conduct other than that, whether it relates to the malicious prosecution or any other action which violated the constitutional rights of the plaintiff may be addressed in your argument, and you may ask for substantial damages and punitive damages, with regard to that.
>
> But there cannot be any reference to the beating. So that the record is clear, I am precluding that, so if you have any comment on that, I certainly would hear you.

(Tr. 2280, 2345-46). Counsel made offers of proof of the physical injuries sustained, the subsequent surgeries, the consequential monetary losses, and the pain and suffering caused by the incident. No damage evidence went to the jury except the arguments of counsel.[9]

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[9] This was a bifurcated trial lasting over 5 1/2 weeks with the same jury determining liability as well as damages.

While the district court was correct in holding that no evidence of damage from an alleged "beating" could be presented to the jury because of its prior decision, the district court erroneously prevented the presentation of any of the proffered evidence of injuries, medical treatment and losses caused by those injuries sustained while in police custody as they relate to the conspiracy counts. In other words, any evidence of injuries proved incurred from the time shortly after the accident to Lenard's release to his family late that evening should be admitted as they relate to being sustained while in police custody. These injuries cannot be presented or argued, however, as being the result of a beating but presented as injuries incurred somehow while under police supervision and protection.

It has been recognized that prisoners are entitled to protection from excessive

use of force by police officers. Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975). This court has held that where there is a showing of deliberate deprivation of constitutional rights while confined, a prisoner is entitled to damages. Black v. Brown, 513 F.2d 652 (7th Cir. 1975); Little v. Walker, 552 F.2d 193, 197-98 (7th Cir. 1977). On reconsideration of the damages on remand, evidence relating to the eye injury and the shoulder injury, the corrective surgeries performed, the costs and monetary losses from these injuries and the prognosis for recovery should be presented to the jury.

Damages may also be considered and awarded for constitutional deprivations. As we held in Hostrop v. Board of Junior College District No. 515, 523 F.2d 569 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976), the trial court should consider, when making an award for constitutional

violations, "the nature of the constitutional deprivation and the magnitude of the mental distress and humiliation suffered by the plaintiff, as well as any other injury caused as a result of being deprived of federally protected rights. . . " Id. at 580. As recently pointed out in this court by Justice Stewart in Owen v. Lash, supra, several courts "have awarded significant damages to compensate for the deprivation of a constitutional right despite the absence of proof on consequential injury." 682 F.2d at 658.

As this court pointed out in Hostrop:

> Although the amount of damages for such an injury cannot be determined by reference to any objective standard, recovery of non-punitive damages for deprivation of intangible rights for which no pecuniary loss can be shown is not without precedent. Courts have traditionally assessed such damages for tortious injury. Examples in civil rights litigation include the awarding of damages for the deprivation of voting rights, for the abridg-

> ment of equal opportunities to housing, for illegal assets, and for violation of the right against unlawful searches and seizures.

523 F.2d at 579 (cites omitted). See also Seaton v. Sky Realty Co., Inc., 491 F.2d 634 (7th Cir. 1974); Corriz v. Naranjo, 667 F.2d 892 (10th Cir. 1982), appeal dismissed per S.Ct. Rule 53, 51 U.S.L.W. 3150 (Aug. 19, 1982).

Upon retrial for damages, Lenard should be allowed to argue damages flowing from the nature of the constitutional deprivation, the mental distress, humiliation or any other injury, if any, caused as the result of the violation of his constitutional rights.

d. Duplicative Award

Argento and Sansone argue on appeal that any damage award for a civil conspiracy would be a duplicative damage award for the act which implemented the conspiracy. They argue that the damages

for the conspiracy. They argue that the damages for the conspiracy counts cannot represent the "beating" but must relate to the conspiracy to prosecute Lenard. The damages for the act of prosecution, they contend, were compensated under the instructions related to the malicious prosecution count and cannot be compensated again under the conspiracy count.

However, the instructions for the conspiracy damages were not isolated to a particular event but rather related to the deprivation of rights of "due course of justice" and "equal protection under the law."[10] An award under §1985 would not be duplicative of the prosecution or the beating but, in this case, go to the finding of deprivation of civil rights while in police custody. See Corriz v. Naranjo, 667 F.2d at 896-898. While courts have held that an award of damages for a state tort

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10 "Where a plaintiff has proven a conspiracy
(continued on next page)

claim joined with a federal civil rights action would be duplicative when there is an adequate state tort remedy, Clapper v. Flynn, 605 F.2d 519, 529 (10th Cir. 1979), there are in this case, only strictly federal civil rights claims. As previously indicated, §1985 provides damages for "injury or deprivation." Thus, it is possible under §1985 to award damages for the act which effectuated the conspiracies and for the conspiracy which caused the deprivation. See Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

(continued)

to obstruct justice and a conspiracy to deprive him of equal protection of the laws, or of equal privileges and immunities under the law, he is entitled to recover without proving any actual injury, substantial damages." (Tr. 2381).

In summary, upon remand for retrial on damages, we direct that there is no category of damages called "substantial," that the evidence of bodily injury sustained by Lenard during his police custody and the related treatments, costs and prognosis shall be considered as damages under §1985 (but they should not be couched as beating injuries), and that any evidence of injuries, i.e., mental distress or humiliation, sustained by Lenard as a result of the deprivation of his federal protected rights should be presented to the jury. However, the awards should not be duplicative of any other compensated injuries. Because of our finding of probable cause and reversal of the malicious prosecution count, no damages under Count III shall be considered on remand.

III. Miscellaneous

a. Omission of "beating" on the verdict form

1964). See also Alloy International Co. v. Hoover-NSK Bearing Co., 635 F.2d 1222 (7th Cir. 1980). In this instance, the trial court adopted the phraseology of §1983 and then proceeded to break down the elements which Lenard had to prove by a preponderance of the evidence. In doing so, the charge read:

> In order to prove his claim that defendants Argento, Sansone, Zito and Culotta, or some of them, deprived him of any of his rights, privileges or immunities secured by the Constitution [sic] and laws, the burden is upon the plaintiff to establish by a preponderance of the evidence each of the following propositions:
>
> > "One, that these defendants, or some of them, knowingly beat, bruised and wounded plaintiff about the face, head and body as alleged.
> >
> > "Two, that these defendants or some of them then and there acted under color of some law of the State of Illinois or some ordinance of the Village of Melrose Park.

Lenard argues that the omission of "battery," "beating," or "excessive force" in the verdict forms submitted to the jury was confusing and misleading. He contends that the general phrase regarding deprivation of "his rights, privileges or immunities" failed to inform the jury that these phrases referred to the excessive use of force. He further contends that the jury could have been confused because the verdict form was captioned with the Village of Melrose Park as well as the other named police defendants when in fact the Village was not charged under Count I of the complaint.

In reviewing the verdict forms, we must look at the instructions to the jury which complement the forms. Instructions should not be isolated in review but the court should look at the total scheme. Dreckman v. Flores, 331 F.2d 221 (7th Cir.

> "Three, that the acts and conduct of these defendants, or some of them, deprived the plaintiff of some of his federal constitutional rights, and
>
> "Four, that the acts and conduct of these defendants or some of them were the proximate cause of injuries and consequent damage to the plaintiff."

(Tr. 2198-99). Thus, looking at the instruction and the accompanying verdict form, it is clear that the deprivation of "privilege and immunities" went to the alleged beating "of the face, head and body" of Lenard. The exact wording of an instruction is within the discretion of the court and will not be overturned unless there was an abuse of that discretion. See Emery v. Northern Pacific Railroad Company, 407 F.2d 109 (8th Cir. 1969). It is clear from the instruction that the verdict form related to the "beating."

While the verdict form was captioned with the Village's name, the instruction

clearly indicated the named police defendants. "[O]nly when there is a complete absence of positive fact to support conclusions reached (by the jury) does a reversible error appear." Almendarez v. Atchison, Topeka and Santa Fe Railway Co., 426 F.2d 1095, 1099 (5th Cir. 1970), citing Lavender v. Kurn, 327 U.S. 645, 653 (1946). We find no prejudicial error in the form caption or the omission of "beating" in the verdict form itself.

b. Jury Instructions

The defendants Argento and Sansone argue that the jury instruction regarding the conspiracy to obstruct justice was overly broad and led the jury to believe that if the defendants were guilty of malicious prosecution they would be similarly guilty on the conspiracy charge. A similar argument was made regarding the equal protection instruction. We cannot agree.

An examination of the record clearly indicates that the trial court properly instructed the jury on the elements of the conspiracy to obstruct justice and the elements of the conspiracy to deprive equal protection. These elements were broken down numerically and relevant terms were defined for the jury. The instruction regarding the malicious prosecution clearly went to the initiation and prosecution of the state charges and not to any civil rights deprivations.[11] As the trial

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[11] "In order to prove his claim that defendants Argento and Sansone, or one of them, maliciously prosecuted him for the offenses of no valid driver's license, resisting arrest, unlawful use of weapons, no firearm owner's identification card, improper lane usage, driving under the influence of alcohol and failure to reduce speed to avoid an accident, or some of them, the burden is upon the plaintiff to establish by a preponderance of the evidence each of the following propositions:

One, that a criminal proceeding was commenced against the plaintiff.

Two, that defendants Argento and Sansone, or one of them, commenced the criminal proceeding against the plaintiff.

(continued on next page)

court had done in the other Counts, it enumerated the elements of the cause of action which clearly delineated to the jury that the malicious prosecution went to the criminal charges and not to any police misconduct. Inasmuch as the jury was properly instructed as to the issues before them, given an understanding of those issues and charged with the duty to determine those issues, we find no prejudicial error to Argento and Sansone. As this court repeated in Alloy International Co. v. Hoover-NSK Bearing Co.:

(continued)

Three, that the plaintiff was found not guilty of one or more of the charges.

Four, that a criminal proceeding was commenced by defendants Argento and Sansone, or one of them, without probable cause.

Five, that defendants Argento and Sansone, or one of them, acted with malice and,

Six, that the defendant was damaged by the criminal proceeding." (Tr. 2209).

> The test, then, is not what meaning the ingenuity of counsel can at leisure attribute to the instructions, but how and in what sense, under the evidence before them and the circumstances of the trial, ordinary men acting as jurors will understand the instructions.

635 F.2d at 1228, (citations omitted).

Argento and Sansone contend that the instructions are overly broad because any misconduct by the defendants would create liability for conspiracy. As previously indicated, any act in the furtherance of or implementation of the conspiracy agreement creates the liability. Thus, if the jury found an agreement between Argento and Sansone and an act in the furtherance of that agreement to hinder the due course of justice or to deny equal protection under the law, the civil conspiracy is triggered.[12] It is within the dominion of the

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12 "So where the evidence in the case shows such a common plan or arrangement between two or (continued on next page)

jury to decide upon the evidence what act of the defendants supported the conspiracy not the instructing court. This jury was not set loose in a vague and cloudy field of legal concepts as charged. It must be pointed out, however, that since this court has found probable cause to arrest Lenard, the prosecution of those charges was not malicious, and the conspiracy count must fail.

In light of our finding of probable cause to effect the arrest of Lenard and reversal of the jury's finding on the malicious prosecution, the challenged instructions regarding the malicious pro-

(continued)

more persons, evidence as to an act done or statement made by one such person is admissible against all, provided that the act be knowingly done or the statement be knowingly made during the continuance of the common plan or arrangement, and in furtherance of some intended object or purpose of the common plan." (Tr. 2204).

secution need not be discussed. Finally, Argento and Sansone challenge the instruction of the trial court as to the Thirteenth Amendment and prejudicial introduction of "slavery" and "involuntary servitude" in this case. The defendants have, however, overlooked the fact that 42 U.S.C. §1981 et seq. has its constitutional derivation from the Thirteenth and Fourteenth Amendments. As the Supreme Court held in Griffin:

> By the Thirteenth Amendment, we committed ourselves as a Nation to the proposition that the former slaves and their descendants should be forever free. To keep that promise, "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." Jones v. Alfred H. Mayer Co., supra, at 440. We can only conclude that Congress was wholly within its powers under §2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of con-

> spiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men.

403 U.S. at 105.

Examining all the instructions as a whole, we do not find the objected to instructions overly broad, confusing or prejudicial.

c. Motions in Limine

The trial court granted a Motion in Limine barring the introduction of evidence of a prior arrest and conviction of Lenard on voluntary manslaughter on March 23, 1953 in Arkansas. He was sixteen years old at the time, but there is no indication on the judgment of conviction (Exhibit A at R. 285) whether or not he was adjudicated as a juvenile. Argento and Sansone contend the granting of the Motion was prejudical error as this conviction went to the issue of Lenard's violent tendencies and anti-

pathy to the law. It is contended that Lenard presented himself as a lifetime law abiding citizen and the defense was prevented from impeaching his credibility through the introduction of three prior arrests and one conviction.[13] While

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[13] Lenard was arrested for premeditated murder but pled guilty to voluntary manslaughter on March 23, 1953. He was apparently arrested in 1960 and resisted arrest in July, 1968. (Offer of proof Tr. 1648-49). Those arrests were not prosecuted. It is unclear from the record, as several documents are missing, but there is passing reference to a gambling conviction but it is not further identified. The trial court granted Lenard's Motion in Limine prohibiting reference to the prior gambling conviction and the prior manslaughter conviction for impeachment purposes. (Tr. Vol. A p. 7). The trial court did not, however, outline on the record the factors considered consistent with this court's standard in United States v. Mahone, 537 F.2d 922, 929 (7th Cir.), cert. denied, 429 U.S. 1025 (1976).

Argento and Sansone argue that this evidence went to the issues in the malicious prosecution count, it could have related to the other counts as well.

Federal Rules of Evidence 609[14] per-

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[14] Federal Rules of Evidence 609 provides:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

mits the admission of evidence of the prior criminal conviction of a witness to attack his credibility if the probative value of the evidence outweighs its prejudicial effect. However, convictions more than ten years old are inadmissible "unless the court determines, in the interest of justice" that the probative value outweighs the prejudicial effect. Id. In addition, juvenile adjudications are similarly inadmissible. In this instance, the conviction was twenty-four years old occurring when Lenard was a juvenile.

(continued)

* * *

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Federal Rules of Evidence 609.

This court has always carefully considered the prejudicial impact of prior convictions and has recommended a standard for the trial courts to guide them in their discretionary function. See, United States v. Mahone, 537 F.2d 922 (7th Cir.), cert. denied, 429 U.S. 1025 (1976). The determination whether the evidence of a prior conviction is more probative than prejudicial is within the trial court's discretion. The House Committee on the Judiciary, when considering the proposed Federal Rules of Evidence, recommended that convictions older than ten years should be totally inadmissible.[15] The Senate's recommendation was that of admission of the conviction on only very rare

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15 H.R. Rp. No. 650, 93rd Cong. 1st Sess., reprinted in, 1974 U.S. Code Cong. & Ad. News pp. 7051, 7085.

and exceptional circumstances.[16] The present rule is a version of the Senate recommendation. The Sixth Circuit in United States v. Sims, 588 F.2d 1145, 1150 (6th Cir. 1978) held that "609(b) creates, in effect, a rebuttable presumption that convictions over ten years old are more prejudicial than helpful and should be excluded." Lenard's conviction was sufficiently remote in time, under possible juvenile adjudication circumstances, and unrelated to his truth telling capabilities or the events in this action. It was not error for the trial court to determine that admission would be highly prejudicial and not in the interest of justice.

Lenard contends the trial court erred when it granted the Motion in Limine of

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16 S. Rep. No. 1277, 93rd Cong. 2d Sess., reprinted in, 1974 U.S. Code Cong. & Ad. News pp. 7051, 7062.

Sansone and Zito regarding their guilty pleas to bribery charges and thirty day suspensions which occurred in August, 1978.[17] It is argued the Village's treatment of these officers on the bribery charge supported the allegations of the Village condoning police misconduct and that such evidence is admissible under Federal Rules of Evidence 404(b).[18]

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[17] On August 30, 1978, Sansone and Zito entered guilty pleas to soliciting and accepting a $100.00 bribe on June 24, 1978.

[18] Federal Rules of Evidence 404(b) provides:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs , or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Generally evidence of other criminal activities is inadmissible unless the evidence of the other crimes or misconduct is relevant. It would be relevant if it bore upon the intent, knowledge, or absence of mistake or accident of the defendant. United States v. Peskin, 527 F.2d 71, 84 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976). See also, United States v. Jones, 438 F.2d 461, 465 (7th Cir. 1971); United States v. Marine, 413 F.2d 214, 216-17 (7th Cir. 1969), cert. denied, 396 U.S. 1001 (1970). The admissibility of other criminal conduct is within the discretion of the trial court. Glasser v. United States, 315 U.S. 60 (1942); United States v. Fierson, 419 F.2d 1020 (7th Cir. 1969); United States v. Graviec, 563 F.2d 313 (7th Cir. 1977).

The bribery admissions of Sansone and Zito do not relate to any charge against

them in this civil action. The bribery and suspensions do not demonstrate any intent or knowledge which correlates to any civil rights deprivation or physical abuse. While both charges might demonstrate police misconduct, the admission of the subsequent suspensions would have to be weighed by the trial court for its prejudicial versus probative value. In addition, Lenard is not seeking to use the evidence against Sansone and Zito but against the Village to prove its intent to condone misconduct. Thus, Lenard is not seeking to use the evidence to show the intent of Sansone and Zito to commit police misconduct but rather to impose a completely different intent upon the Village. The proposed use of this evidence is completely outside the exceptions of 404(b). The suspensions are unrelated to any facts at issue in this case and do not have "any tendency to make the evidence of any fact

that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Federal Rules of Evidence 401. The trial court properly acted within its discretion to deny the admission of the suspensions.

Lenard also argues the trial court erred when it granted the Motion in Limine in respect to the police officer defendants' assertion of their Fifth Amendment privileges to internal investigators and the Cook County Grand Jury investigating the incident. (The officers did testify two weeks later). Lenard argues that the Village's failure to discipline the officers for invocation of their Fifth Amendment privilege was further evidence of a Village cover-up or condoning of misconduct. The Supreme Court held in Gardner v. Broderick, 392 U.S. 273 (1968), how-

ever, that a police officer cannot be disciplined for invocation of his Fifth Amendment privilege nor his failure to sign a waiver of immunity with respect to any testimony when the officer is called before a grand jury investigating criminal conduct with which he may be involved. Thus, the Village was prohibited from disciplining the officers under Gardner. Failure to discipline could not then be part of a cover-up. The failure of the Village to reinterview the defendants for its own internal investigation after their waiver of privilege before the Grand Jury fails to demonstrate an intention to cover-up, especially when Sansone and Zito were suspended a year and half later. The trial court acted within its discretion in granting the Motion.

d. Statements made by counsel

While this Court appreciates the advocacy displayed by these attorneys on behalf of their clients, there were times during the course of reviewing the briefs and records of this case when it wondered whether these attorneys were in the same courtroom hearing the same case. While florid language and zealous advocacy display commitment to their respective causes, exaggerations and personal attacks do not factually present issues before an appellate court.

Defendants Argento and Sansone contend on appeal that several statements made by Lenard's counsel, including statements regarding religious affiliations and the veracity of Sansone in his testimony, amounted to reversible error. Personal observations, evaluations and recommendations are not part of the role of trial

counsel but in the context of all the evidence and the clear cautionary instructions of the trial court regarding the arguments of counsel, these statements do not rise to the level of reversible error. We find any error in statements made by either counsel to be harmless error within Fed. R. Civ. P. 61. Kotteakos v. United States, 328 U.S. 750, 761-62 (1946). We do congratulate the trial court for its very fair, even-handed handling of this long difficult case.

IV. Attorney Fees

The conclusion of the trial was far from the conclusion of the issues of the Lenard case on appeal. In October, 1980, the trial court in a Memorandum Opinion (R. 281) ruled that each party had prevailed to some extent and denied cross-motions by the plaintiff and defendants for attorney fees under the Civil Rights Attorneys Fees

Awards Act of 1976, 42 U.S.C. §1988.[19] Subsequent to that decision, this appellate court modified its prior ruling of Roesel v. Joliet Wrought Washer Co., 596 F.2d 183 (7th Cir. 1979), in the cases of Coop v. City of South Bend, 635 F.2d 652 (7th Cir. 1980) and Murphy v. Kolovitz, 635 F.2d 662 (7th Cir. 1981). As a result of this modification, the trial court reconsidered the question of attorney's fees and granted the plaintiff's motion regard-

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[19] 42 U.S.C. §1988 provides:

> . . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

ing fees.[20] The trial court denied Defendants' Motion to Reconsider on May 29, 1981. On the same date the trial court awarded to the plaintiff attorney's fees in the amount of $180,500. The trial court also awarded costs to the plaintiff. Argento and Sansone made a Motion to Reconsider the Award of $180,500 in fees pointing out that the attorneys had entered into fee agreements with Lenard limiting their fees to 1/3 of the recovery at trial. The trial court in its Memorandum Opinion examined the case law of other circuits and the terms of the 1981 fee agreement[21] and

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20 Memorandum Opinion dated January 30, 1981.

21 The January 21, 1981 Attorney's contract signed by Bennie Lenard and Cecile Singer provided in part:

> I HEREBY accept the foregoing terms and conditions and agree to make no charge for our services unless and except to the extent that money or property is recovered on such claims or suits. I further agree to make no settlement

(continued on next page)

found that plaintiff's counsel had limited their fees to one-third of the judgment. The court then modified the fee award to $120,000. This Memorandum Opinion was entered on June 19, 1981.

On June 26, 1981, the defendants filed notice of appeal from all orders of the district court related to fees and costs. On June 29, 1981, the plaintiff filed in the district court a Motion to Reconsider the reduction of fees. This motion was within the ten-day time requirements of post-judgment motions. The court ordered memorandums of the issue of fee reduction and held oral arguments on the issue.

(continued)

without the consent of the above claimant. I further agree that any money awarded as and for attorneys fees under the Civil Rights Attorneys Fees Award [sic] Act, for services rendered in prosecution of the trial, appeal before the Seventh Circuit Court of Appeals, and the re-trial (if necessary) of this cause shall be applied and credited, up to and including, but not to exceed the stated per centage [sic] of the amount recovered on the claim (33 1/3% for trial; 40% for trial and appeal; 50% for trial, appeal, and retrial).

After consideration of the memorandums and arguments, the district court found the disputed provision of the 1981 fee agreement ambiguous. Since the court found the contract terms ambiguous, Illinois case law permitted the use of extrinsic evidence to enable the court to reach a proper interpretation. Considering the affidavits of Lenard and Attorney Singer, the court held the provision was a credit provision and not a limit to attorney's fees. The district court ordered the vacation of the June 19 judgment and the reinstatement of the award of $180,500 in attorney's fees in a Memorandum Opinion of July 29, 1981.

On appeal, initially, Argento and Sansone argue that the district court did not have jurisdiction over Lenard's June 29 Motion to Reconsider because they had already filed their appeal. In addition, it is argued that Lenard was not the prevailing party; that special circumstances

require denial of fees; that the fees should be limited to the contingent contract; that the trial court did not limit the fees to the successful claims; that fees should not be awarded for the pendent claim of malicious prosecution; and that costs should not have been awarded under §1988.

As a result of this Court's decision reversing the judgments under Counts III and V of the Complaint, affirming the jury verdict on Count I and remanding the case for retrial of damages under Count II, the issue regarding the final amount of attorney's fees must also be remanded to the trial court. In light of Judge Posner's concerns over the "nest of Chinese boxes" in civil rights litigation (Muscare v. Quinn, 680 F.2d 42 (7th Cir. 1982)), we will address some of the issues raised on appeal.

The filing of a timely Motion for appeal has the effect of transferring the jurisdiction over the case from the district court to that of the appellate court. 9 Moore's Federal Practice ¶203.11 (1982); United States v. Lafko, 520 F.2d 622 (3d Cir. 1975). Under Fed.R.App.P. 4(a)(1) the notice of appeal should be filed within 30 days from the entry of judgment or order appealed from. However, the rule further provides that:

> (4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above

> motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

Fed. R. App. P. 4(a)(4).

For the purposes of Rule 4(a), a motion to reconsider has been held to qualify as a Rule 59(e) motion. Richerson v. Jones, 572 F.2d 89, 93 (3d Cir. 1978); Jones v. Nelson, 484 F.2d 1165, 1167-68 (10th Cir. 1973); 9 Moore's Federal Practice ¶204.12[1], p. 4-67 (1982). Thus, a timely motion to reconsider postpones the running of the time for appeal. If the time to file is postponed by a motion, the district court must have jurisdiction to consider the motion. As the rule states "[a] notice of appeal filed before the granting or denying of any of the above motions shall have no effect. A new notice must be filed . . ." Fed. R. App. P. 4(a)(4). We find

that the district court had jurisdiction to consider the Motion to Reconsider the opinion of June 19, 1981, timely filed by the plaintiff on June 29, 1981. The defendants filed a notice of appeal from the opinion reinstating the fees of $180,500 on August 31, 1981. Per stipulation, all appeals were consolidated for hearing and oral argument. We will now consider the appropriateness of attorney's fees and the factors that should be considered by the trial court in the awarding of fees.

The awarding of attorney's fees is within the discretion of the trial court but that discretion is a narrow one. Dawson v. Patrick, 600 F.2d 70, 79 (7th Cir. 1979). The fees should only be denied when special circumstances would render an award unjust. Id. The key to the award of attorney's fees is the determination as to who is the prevailing party. This Circuit in Busche v. Burkee, 649 F.2d 509, 521 (7th

Cir.), cert. denied, _____ U.S. _____, 102 S.Ct. 396 (1981), adopted the definition of the First Circuit in Nadeau v. Helgemoe, 581 F.2d 275, 278-9 (1st Cir. 1978) which stated:

> plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.

(emphasis added).

On the trial court level, Lenard failed in the significant allegation of the "beating" under §1983. Similarly, while he was sustained in his charges under the conspiracy counts, the jury found liability only for Argento and Sansone and not the other named defendants. On this appeal, this Court has only affirmed the findings of the jury on one of the conspiracy charges and reversed the findings on the malicious prosecution and obstruction of justice. This Circuit has held

that "a prevailing plaintiff should receive fees almost as a matter of course." Davis v. Murphy, 587 F.2d 362, 364 (7th Cir. 1978). It cannot be said, however, that Lenard has prevailed in the case as a whole but rather he was partially successful in his civil rights claims. As was held in Muscare v. Quinn, 614 F.2d 577, 580 (7th Cir. 1980), attorney's fees should be awarded only for the preparation and presentation of claims on which the plaintiff has prevailed. "[T]he amount of attorney's fees they receive [prevailing plaintiff] should be based on the work performed on the issues in which they were successful." Nadeau v. Helgemoe, 581 F.2d at 279; Busche v. Burkee, 649 F.wd at 522. See also Coop v. City of South Bend, supra; Murphy v. Kolovitz, supra; Harrington v. DeVito, 656 F.2d 264 (7th Cir. 1981), cert. denied, _____ U.S. _____, 102 S.Ct. 1621 (1982). On remand the trial court should

carefully review the time sheets on the successful claim of Count II in light of the Waters factors adopted in Muscare v. Quinn, 614 F.2d at 579. See also Busche v. Burkee, 649 F.2d at 522.

The defendants argue that, even if Lenard did prevail, fees should be denied because of the special circumstances of the size of the damage award, the contingent attorney contract and the financial position of the defendants. The amount of the damage award, large or small, is not a circumstance to be considered in the awarding of fees. Coop v. City of South Bend, 635 F.2d at 654. The purpose of the Attorneys Fees Awards Act was to effectuate and assist the private citizen in the enforcement of the Civil Rights Act. (See the legislative history, S.Rep. No. 1011, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. & Ad. News 5908-5914). We do not view the size of any damage award of

these attorney's fees. But see Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir.), petition for cert. filed, 51 U.S.L.W. 3055 (U.S. May 19, 1982) (No. 81-2135); Mirabel v. General Motors Acceptance Corp., 576 F.2d 729 (7th Cir.), cert. denied, 439 U.S. 1039 (1978). The trial court may consider as a factor the contingent fee contract, but it is not to be an automatic limitation on the attorney list fee award. See Sanchez v. Schwartz, 688 F.2d 503 (7th Cir. 1982); Strama v. Peterson, 689 F.2d 661 (7th Cir. 1982). See also Sargeant v. Sharp, 579 F.2d 645 (1st Cir. 1978). Additionally, while we recognize that these defendants are two young police officers, the ability to pay a fee award has been held not to be a special circumstance that would bar an award. Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir.), cert. denied, 450 U.S. 919 (1980). We are aware that currently the

question of the insurance company's liability for the damage award is being litigated in the magistrate's court. We do not express any opinion regarding amount of damages, fees or costs to affect those proceedings.

As Chief Judge Cummings recently wrote in Sanchez v. Schwartz, supra, a contingent fee contract should not serve "as an automatic ceiling on the amount of a statutory award." Slip op. at 4. See also Furtado v. Bishop, 635 F.2d 915, 920 (1st Cir. 1980).[22] The trial court properly

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22 But see Cooper v. Singer, 689 F.2d 929 (10th Cir. 1982). The 10th Circuit Cooper decision holds the amount of fees under a contingent contract to be the maximum allowable amount to be awarded under §1988. This is contrary to this Circuit's holding in Sanchez v. Schwartz, supra, wherein we declined to hold a contingent fee contract as an automatic ceiling on an award and concluded that any such holding would be contrary to the legislative history. 688 F.2d at 505. See Judge Holloway's dissent in Cooper.

reconsidered the disputed provision of the 1981 fee agreement.[23] It is the function of the courts to seek the proper interpretation of a contract which reflects the intentions of the parties. Stanley v. Chastak, 34 Ill.App.2d 220, 180 N.E.2d 512, 520 (2d Dist. 1962); Greene v. Gust, 26 Ill.App.2d 2, 167 N.E.2d 438, 441 (1st Dist. 1970); 4 S.Williston, A Treatise on the Law of Contracts §601 (3d ed. 1961). It is clear from the contract, the memorandum in support of the Motion to Reconsider and the affidavits attached thereof that it was the intention of Lenard and his attorneys that any award under §1988 would be credited to any fees owing under the contingent contract. The excess attorney's fee award, if any, would go the attorneys. We cannot express or confirm the final amount of the attorney's fees

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23 See fn. 21, infra.

because the trial court must reexamine the award and limit the fees to the prevailing issue.

The defendants contend that the trial court improperly awarded costs under §1988. They base this contention upon the fact that the court reversed its stand regarding costs after it reconsidered the attorney's fees issue in January, 1981. Costs are allowable under §1988. Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624, 642 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980); Konczak v. Tyrrell, 603 F.2d 13, 18-19 (7th Cir. 1979), cert. denied, 444 U.S. 1016 (1980). Costs are also allowable under Fed.R.Civ.P. 54(d) and 28 U.S.C. §1920. These costs are awarded to the prevailing party. Busche v. Burkee, 649 F.2d at 522. It must be remembered that up to January, 1981, the trial court regarded this case a draw. It was only after the

clarification of "prevailing" in civil rights cases that the trial court awarded costs. While the court did not indicate, in its Order awarding costs, the statutory basis for the award, we believe that such costs are allowable under §1988, 54(d) and §1920. Deposition costs are allowable within the discretion of the trial court, Bailey v. Meister Brau, Inc., 535 F.2d 982, 996 (7th Cir. 1976), as are copying costs, SCA Services, Inc. v. Lucky Stores, 599 F.2d 178, 180 (7th Cir. 1979). We find no abuse of discretion in the trial court regarding the costs.

Since Lenard was successful in prevailing on the issue of conspiracy to deprive equal protection, on appeal, the trial court should determine the reasonable fees on this issue on appeal keeping in mind the totality of the case. See Muscare v. Quinn, 680 F.2d 42, supra. See also, Hanrahan v. Hampton, 446 U.S. 754

(1980).

## V. Conclusion

For all the above reasons we:

1. Affirm the jury verdict as to Count I;
2. Affirm the jury verdict as to liability under Count II but reverse and remand for retrial as to damages under Count II as to defendants Argento and Sansone;
3. Reverse the jury verdict as to Count III as to defendants Argento and Sansone;
4. Reverse the jury verdict as to Count V as to defendants Argento and Sansone;
5. Affirm the jury verdicts as to Zito and Culotta;
6. Affirm the Directed Verdict as to the Village of Melrose Park;
7. Reverse the District Court's award of $180,500 in attorney's fees and remand for recalculation in light of this opinion;

8. Remand to the District Court for determination of attorney's fees on appeal for those issues on which Lenard prevailed in this court.

Circuit Rule 18 shall not apply.

AFFIRMED in part, REVERSED in part and REMANDED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

Opinion by Judge Grant

Judgment -- Oral Argument
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 1, 1983

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge

Hon. Richard D. Cudahy, Circuit Judge

Hon. Robert A. Grant, Senior District Judge*

Nos. 80-2602, 80-2666, 81-2036, 81-2434

| | |
|---|---|
| Bennie Lenard, Plaintiff-Appellee, Cross-Appellant, | ) Appeals from ) the United ) States District ) for the Northern ) District of ) Illinois, Eastern |
| vs. | ) Division. |
| Robert Argento and Joseph Sansone, Defendants-Appellants, | ) No. 77-C-1208 ) Judges Joel ) M. Flaum and ) Marvin E. Aspen |
| vs. | ) |
| Village of Melrose Park, a municipal corporation, et al., Defendants-Appellees. | ) ) ) ) |

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part, REVERSED in part, and REMANDED, in accordance with the opinion of this Court filed this date. Costs on appeal awarded to plaintiff Lenard, against defendants Argento and Sansone.

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* The Honorable Robert A. Grant, Senior District Judge of the Northern District of Indiana, sitting by designation.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

March 10, 1983

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge

Hon. Richard D. Cudahy, Circuit Judge

Hon. Robert A. Grant, Senior District Judge*

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|---|---|
| Bennie Lenard, Plaintiff-Appellee, Cross-Appellant, | ) |
| | ) Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 77 C 1208 Joel M. Flaum, Judge |
| Nos. 80-2602, 80-2666 81-2036, 81-2434 vs. | ) |
| Robert Argento & Joseph Sansone, Defendants-Appellants, vs. Village of Melrose Park, Defendant-Appellee. | ) |

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* Honorable Robert A. Grant, Senior District Judge of the United States District Court for the Northern District of Indiana, sitting by designation.

On consideration of the petition for rehearing filed in the above-entitled cause by defendants-appellants, Robert Argento and Joseph Sansone, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

March 18, 1983

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge

| | |
|---|---|
| Nos. 80-2602, 80-2666, 81-2036 and 81-2434 | Appeals from the United States District Court for the Northern District of Illinois, Eastern Division No.77 C 1208 Judge Joel M. Flaum |
| Bennie Lenard, Plaintiff-Appellee, Cross-Appellant vs. Robert Argento, Joseph Sansone and Village of Melrose Park, a municipal corporation, et al., Defendants-Appellants, Cross-Appellees | |

On consideration of the "MOTION TO STAY ISSUANCE OF MANDATE" filed herein on March 16, 1983, by counsel for the defendants-appellants, cross-appellees,

IT IS ORDERED that said Motion is GRANTED to the extent that the mandate of this court is hereby stayed to and

including April 18, 1983, without prejudice to the reapplication for a continuance.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
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| Bennie Lenard, | ) | |
| | ) | |
| Plaintiff, | ) | |
| vs. | ) | 77 C 1208 |
| | ) | |
| Robert Argento and Joseph Sansone, | ) | |
| | ) | |
| Defendants. | ) | |

MEMORANDUM OPINION

Joel M. Flaum, District Judge:

This matter comes before the court on plaintiff's motion to reconsider the order reducing attorneys' fees. For the reasons set forth below, the motion is granted.

On June 19, 1981 the court reduced the attorneys' fee award to plaintiff from $180,500 to $120,000. This reduction was based upon the following provision in a fee agreement between plaintiff and his attorneys dated January 21, 1981 (the "1981 fee agreement"):

> I further agree that any money awarded as and for attorneys fees under the Civil Rights Attorneys Fees Award Act, for services rendered in prosecution of the trial, appeal before the Seventh Circuit Court of Appeals, and the retrial (if necessary) of this cause shall be applied and credited, up to and including, but not to exceed the stated per centage of the amount recovered on the claim (33-1/3% for trial; 40% for trial and appeal; 50% for trial, appeal, and retrial).

Plaintiff now asks the court to reconsider the reduction of the attorneys' fee award to $120,000.

After consideration of the memoranda in support of and in opposition to this motion for reconsideration and the arguments made by counsel for both plaintiff and defendants Argento and Sansone, the court has concluded that the above-quoted provision of the 1981 fee agreement is ambiguous. If a written contract is so ambiguous in its terms that the contractual intentions of the parties cannot be understood from

a mere inspection of the instrument, extrinsic evidence may be received to enable the court to make a proper interpretation of the instrument. Stanley v. Chastek, 34 Ill.App.2d 220, 180 N.E.2d 512, 520 (2d Dist. 1962); Greene v. Gust, 26 Ill.App.2d 2, N.E.2d 438, 441 (1st Dist. 1970). Here the affidavits of plaintiff and Cecile Singer indicate that the parties of the 1981 fee agreement intended, at the time the 1981 fee agreement was entered into, the above-quoted provision to be merely a credit provision and not a provision limiting the amount of fees which plaintiff's attorneys would receive. Therefore, that part of the court's opinion dated June 19, 1981 reducing the attorneys' fee award to plaintiff to $120,000 is vacated and the attorneys' fees award in the sum of $180,500 is reinstated.

Accordingly, plaintiff's motion to reconsider the order reducing attorneys' fees is granted.

It is so ordered.

Joel M. Flaum
United States District Judge

Dated: July 29, 1981

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| Bennie Lenard, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | 77 C 1208 |
| | ) | |
| Robert Argento and Joseph Sansone, | ) | |
| | ) | |
| Defendants. | ) | |

MEMORANDUM OPINION

Joel M. Flaum, District Judge:

This matter comes before the court on plaintiff's motion for an award of attorney's fees pursuant to 42 U.S.C.§1988. For the reasons set forth below, plaintiff is awarded attorneys' fees in the sum of $180,500.00.

Plaintiff has asked for fees of $100 to $150 per hour for attorneys Cecile Singer ("Singer"), Edward T. Stein ("Stein"), Val R. Klink ("Klink") and Donald T. Bertucci ("Bertucci") and $85 per hour for attorney

Mary Rita Luecke ("Luecke"). These fees are requested for 1166.8 hours of Singer's time, for 640.2 hours of Stein's time, 394.3 hours of Bertucci's time, 151.5 hours of Klink's time and 36.5 hours of Luecke's time.

The court carefully has reviewed the time sheets attached to each attorney's affidavit. These time sheets indicate that duplication of time occurred when such was inappropriate [1/] and that time spent on unsuccessful claims still is in-

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[1/] For example, at several depositions more than one of plaintiff's attorneys were present and at trial three attorneys were present.

cluded. [2/] In addition to hours spent times billing rate, the factors to be considered in determining the reasonableness of attorneys' fees are the following:

---

[2/] For example, plaintiff has not omitted time spent on research relating to unsuccessful claims and on drafting of the complaint and amendments thereto which alleged unsuccessful claims. Attorneys' fees should be awarded under section 1988 only for preparation and presentation of the claims on which a plaintiff is determined to have prevailed. Busche v. Burkee, Nos. 80-1248 and 80-1345, at 21 (7th Cir. May 21, 1981).

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent. Muscare v.

Quinn, 614 F.2d 577, 579 (7th Cir. 1980).

After taking all the above factors into consideration, the court concludes: (1) that fees of $100 per hour for Klink and Bertucci, of $90 per hour for Stein, of $80 per hour for Singer and of $50 per hour for Luecke, are reasonable; and (2) that the hours for which each attorney may be compensated are as follows: 1,000 hours for Singer, 600 hours for Stein, 350 hours for Bertucci, 100 hours for Klink [3/] and

---

[3/] The administrator of Klink's estate also has asked the court to award fees for 29 hours of estimated time. Since the court has no idea how these estimates were arrived at, it is unable to consider this time.

30 hours for Luecke. Therefore, the fee award is calculated as follows:

| | | |
|---|---|---|
| Bertucci | 350 hrs.x 100/hr= | $ 35,000 |
| Klink | 100 hrs x $100/hr= | $ 10,000 |
| Stein | 600 hrs x $90/hr= | $ 54,000 |
| Singer | 1000 hrs x $80/hr= | $ 80,000 |
| Luecke | 30 hrs x $50/hr= | $ 1,500 |
| | Total | $180,500 |

Accordingly, plaintiff is awarded attorneys' fees in the sum of $180,500.

It is so ordered.

Joel M. Flaum
United States District Judge

Dated: May 29, 1981

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| Bennie Lenard, Plaintiff, | ) | |
| v. | ) | 77 C 1208 |
| Village of Melrose Park, a municipal corporation, Robert Argento, Joseph Sansone, George Zito, Bruce Culotta, John Doe, and others not presently known to the Plaintiff, individually and as Police Officers of the Police Department of the Village of Melrose Park, Westland Community Hospital, an Illinois corporation, D.T. Mehrpuyan and Andrea Dreyer, Defendants. | ) | |

JUDGMENT

Joel M. Flaum, District Judge:

This action came on for trial before the court and a jury, and the issues having been duly tried and the jury having duly rendered its verdicts,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is hereby entered in favor of plaintiff and against defendants Argento

and Sansone as to plaintiff's claim that a conspiracy was entered into for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice;

That judgment is hereby entered in favor of plaintiff and against defendants Argento and Sansone as to plaintiff's claim that a conspiracy was entered into for the purpose of depriving him of the equal protection of the laws or of equal privileges and immunities under the law;

That judgment is hereby entered in favor of plaintiff and against defendants Argento and Sansone as to plaintiff's claim that he was maliciously prosecuted;

That judgment is hereby entered in favor of defendants Argento, Sansone, Culotta, Zito and Village of Melrose Park and against plaintiff as to his claim that he was deprived of any of his rights,

privileges or immunities secured by the Constitution and laws;

That judgment is hereby entered in favor of defendants Culotto, Zito and Village of Melrose Park and againt plaintiff as to his claim that a conspiracy was entered into for the purpose of impeding, hindering, obstructing or defeating, in any manner, the due course of justice;

That judgment is hereby entered in favor of defendants Culotta, Zito and Village of Melrose Park and against plaintiff as to his claim that a conspiracy was entered into for the purpose of depriving him of equal protection of the laws or of equal privileges and immunities under the law;

That plaintiff recover of defendants Argento and Sansone as actual or compensatory damages the sum of $10,000.00, with interest thereon at the rate of nine per-

cent per annum;

That plaintiff recover of defendants Argento and Sansone as substantial damages the sum of $125,000.00, with interest thereon at the rate of nine percent per annum;

That plaintiff recover of defendant Argento as punitive and exemplary damages the sum of $150,000.00, with interest thereon at the rate of nine percent per annum; and

That plaintiff recover of defendant Sansone as punitive and exemplary damages the sum of $75,000.00, with interest thereon at the rate of nine percent per annum.

Joel M. Flaum
United States District Judge

Dated: 3/19/80

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| Bennie Lenard, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | 77 C 1208 |
| | ) | |
| Village of Melrose Park, a municipal corporation; Robert Argento, Joseph Sansone, George Zito, and Bruce Culotta, | ) | |
| | ) | |
| Defendants. | ) | |

V E R D I C T

We, the Jury, find for the following Defendant(s): Village of Melrose Park, Robert Argento, Joseph Sansone, George Zito, Bruce Culotta and against the Plaintiff as to his claim that he was deprived of any of his rights, privileges or immunities secured by the Constitution and laws.

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FOREPERSON

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| Bennie Lenard, Plaintiff, | ) | |
| v. | ) | 77 C 1208 |
| Village of Melrose Park, a municipal corporation; Robert Argento, Joseph Sansone, George Zito, and Bruce Culotta, Defendants. | ) | |

V E R D I C T

We, the Jury, find for the following Defendant(s): Village of Melrose Park, George Zito and Bruce Culotta and against the Plaintiff as to his claim that a conspiracy was entered into for the purpose of depriving him of equal protection of the laws or of equal privileges and immunities under the law.

FOREPERSON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| Bennie Lenard, Plaintiff, | ) | |
| v. | ) | 77 C 1208 |
| Village of Melrose Park, a municipal corporation; Robert Argento, Joseph Sansone, George Zito, and Bruce Culotta, Defendants. | ) | |

V E R D I C T

We, the Jury, find for the Plaintiff and against the following Defendant(s): Robert Argento and Joseph Sansone as to Plaintiff's claim that a conspiracy was entered into for the purpose of depriving him of the equal protection of the laws or of equal privileges and immunities under the law.

FOREPERSON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| Bennie Lenard, Plaintiff, | ) | |
| v. | ) | 77 C 1208 |
| Village of Melrose Park, a municipal corporation; Robert Argento, Joseph Sansone, George Zito, and Bruce Culotta, Defendants. | ) | |

V E R D I C T

We, the Jury, find for the following Defendant(s): Village of Melrose Park, George Zito and Bruce Cullotta and against the Plaintiff as to his claim that a conspiracy was entered into for the purpose of impeding, hindering, obstructing or defeating, in any manner, the due course of justice.

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FOREPERSON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| Bennie Lenard, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | 77 C 1208 |
| | ) | |
| Village of Melrose Park, a municipal corporation; Robert Argento, Joseph Sansone, George Zito, and Bruce Culotta, | ) | |
| | ) | |
| Defendants. | ) | |

V E R D I C T

We, the Jury, find for the Plaintiff and against the following Defendant(s): Robert Argento and Joseph Sansone as to Plaintiff's claim that a conspiracy was entered into for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice.

FOREPERSON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| Bennie Lenard, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | 77 C 1208 |
| | ) | |
| Village of Melrose Park, a municipal corporation; Robert Argento, Joseph Sansone, George Zito, and Bruce Culotta, | ) | |
| | ) | |
| Defendants. | ) | |

V E R D I C T

We, the Jury, find for the Plaintiff and against the following Defendant(s): Robert Argento and Joseph Sansone as to Plaintiff's claim that he was maliciously prosecuted.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| Bennie Lenard, | ) | |
| | ) | |
| Plaintiff, | ) | |
| v. | ) | 77 C 1208 |
| | ) | |
| Robert Argento and Joseph Sansone, | ) | |
| | ) | |
| Defendants. | ) | |

V E R D I C T

We, the Jury, assess the plaintiff's actual or compensatory damages in the sum of $10,000.00.

We, the Jury, award the plaintiff substantial damages in the sum of $125,000.00.

We, the Jury, award the plaintiff punitive and exemplary damages against defendant Argento in the sum of $150,000.00.

We, the Jury, award the plaintiff punitive and exemplary damages against defen-

dant Sansone in the sum of $75,000.00.

FOREPERSON

## TEXT OF CONSTITUTIONAL PROVISION, STATUTES AND RULES

### Amendment XIV To The United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## 42 U.S.C. §1985(2)and (3)

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party

or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce,

the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector

for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support of advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. §1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title

"CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found

guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

## RULE 18 OF THE RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS

### Reassignment of Remanded Cases

Whenever a case tried in a district court is remanded by this court for a new trial, it shall be reassigned by the district court for trial before a judge other than the judge who heard the prior trial unless the remand order directs or all parties request that the same judge retry the case. In appeals which are not subject to this rule by its terms, this court may nevertheless direct in its opinion or order that this rule shall apply on remand.

Office - Supreme Court, U.S.
FILED
JUL 15 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1692

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

---

ROBERT ARGENTO AND JOSEPH SANSONE,

Petitioner,

vs.

BENNIE LENARD,

Respondent.

---

# ANSWER TO PETITION FOR WRIT OF CERTIORARI

---

EDWARD T. STEIN
CECILE SINGER

Attorneys for Respondent

Edward T. Stein
Cecile Singer
53 W. Jackson Blvd.
Suite 1315
Chicago, IL 60604
(312)431-0082

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

---

ROBERT ARGENTO AND JOSEPH SANSONE,

Petitioners,

vs.

BENNIE LENARD

Respondent.

ANSWER TO PETITION FOR
A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners seek review of the decision of the United States Court of Appeals for the Seventh Circuit entered February 1, 1983 in Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983). In that opinion the Court of Appeals affirmed the finding of liability against Petitioners Argento and Sansone on Lenard's claim that he was deprived of his right to equal protection of the laws in violation of 42 U.S.C. §1985 (3) (Count II of the

Complaint).

The case was tried before a jury over a five and one-half week period in February and March, 1980. The jury found Argento and Sansone liable on three of the four claims brought against them, and in the bifurcated liability phase, awarded Lenard a total of $360,000 in damages. Subsequent to the trial, the district court awarded Lenard $180,500 in attorneys fees pursuant to 42 U.S.C. §1988.

The Court of Appeals after reversing the finding of liability for malicious prosecution and for what it opined was a 1985(2) violation that related to the malicious prosecution claim (Counts III and V of the Complaint), then remanded the matter to the district court for a retrial on the damages issue, and for a recomputation of the attorneys fees in

light of its opinion. Before the damages issue could be retried, Petitioners filed their pending Petition for a Writ of Certiorari. So, in its present status, there is no money judgment in this case. In the course of its opinion, the Seventh Circuit gives direction to the trial court with respect to what evidence to permit in re-trying the damages issue. Petitioners thus anticipate an award to Lenard of which they will disapprove. They object both to the guidance given the district court by the Court of Appeals, as well as to its affirmance of liability on Count II.

Petitioners in their statement of the case as well as their three page "factualsummary", Petition for Writ of Certiorari at 17, carefully avoid the relevant facts that describe the events of January 31, 1977 as related in 2,500 pages of trial transcript. Not only does

this "factual summary" excise virtually all the evidence which was unfavorable to Petitioners, but what it does summarize seriously misrepresents what the evidence was. The statement of facts is thus noteworthy not for what it says, but for what it omits.

The Petitioners'"factual summary" neglects to mention the following. At the time that Lenard, a black employee of International Harvester Company for 13 years, was handcuffed behind his back at 1:00 p.m. and taken into custody, he was in excellent health and had no physical disability. When he was released from custody at 3:00 a.m., the next morning, he was admitted to a Hospital for 39 days Record at 1596. Three months later he was readmitted for surgery to repair tendons of ligaments of the left shoulder that were torn while in custody. Record

at 1488 The orthopedic surgeon who treated Lenard testified that the injury which resulted in permanent disability, Record at 1490, was caused by a sudden jerk or force to the arm. Record at 1492. An opthamologist testified that Lenard suffered traumatic retinopathy to the eye, Record at 1222, caused by a direct blunt injury. Record at 1217. According to the opthamologist, the injury, which is permanent, could not have occurred in the manner that the Defendants claimed it happened. Record at 1218.

The Defendant police officers attributed Lenard's injuries to two falls in the police department parking lot, and a third fall up the stairwell in the inside of the station. Two officers came out to the parking lot to assist Argento in bringing Lenard, who was still handcuffed behind his back, inside the

station. Record at 290. Argento testified that, while holding Lenard, they slipped on the ice and all four fell to the ground. Record at 291. Lenard fell on his face and all three policemen "went down on him". Record at 293. They got up, and everybody fell down a second time. Record at 294. Again, according to Argento, Lenard fell on his face. Record at 295. They got inside the doorway, and all four men started up the stairs. They all fell a third time, and for the third time, Lenard fell directly on his face. Record at 297.

Lenard testified that after being handcuffed at the accident scene, he was walked over to Argento's squad car and placed in the back seat. After closing the door, Argento and Sansone talked to one another outside. Record at 1574. After Argento got in the car, he turned

and said to Lenard "God damn it, I'm going to teach you something." Lenard said he asked "Officer what have I did?" Record at 1574-1575. Argento excitedly said "God damn it, nigger, What you say? Huh? What you say?" Record at 1575. At that point, Lenard was hit with what looked to him like a stick. He felt two more quick hits and lapsed into unconsciousness. Record at 1576. As Argento's squad car pulled up behind the Melrose Park police station, he remembered hearing Argento tell someone "I got a big Black nigger." Record at 1580. He was grabbed around the neck and went down on his knees. Record at 1581. As he was being kicked and hit, he begged "Please don't kill me. I'm trying, I'm trying. Please don't kill me." At this point he lapsed into unconsciousness again. Record at 1582.

He next remembered laying on the wet

floor of a cold cell. His clothing had been removed and he had been stripped down to his underwear. He had been doused with water, was in extreme pain, and was very cold and wet. Record at 1584. His face and left arm were hurting. He couldn't see. A police officer brought him his pants, turtleneck sweater, coat and his rubber galoshes that still had his shoes in them. Record at 1585. Argento admitted that he was the one who removed Lenard's pants and the person who later gave the pants back to Lenard. Record at 299-300. The two officers who, along with Argento, brought Lenard into the station, as well as the shift sergeant on duty all testified that they knew Lenard was seriously injured when he was brought in. Record at 778, 819, 886. Nevertheless, Lenard was put face down in a concrete pit in the cell, stripped of his clothing, doused with

water and subjected to a sub-zero wind from an open window. First aid was not administered, Record at 788, nor was any medical assistance summoned. Record at 785, 793, 819. When Andrea Dreyer, the civilian complainant, arrived at the station, Argento told her that Lenard was downstairs "sleeping it off in his long-johns." Record at 669. Nothing was mentioned about any problem getting Lenard into the station, Record at 70, nor about any injuries.

Lenard continued to lay on a concrete slab in that cell. He remembered two officers asking if he wanted to go to the hospital. He answered yes, but please call my wife. One of the officers then said "Leave him alone. He doesn't want to go to the hospital." Record at 1586. Because of the injuries he sustained, he could not

see who these officers were, Record at 1587, but Argento testified that he had returned to Lenard's cell "to inquire whether Lenard wanted to see a doctor." Petition for Writ of Certiorari at 23. Lenard continued to lay on the concrete slab. He was cold, shaking and in pain. A cold wind was blowing on him and he pleaded for someone to turn the fan off. Record at 1587. A police officer came back and said "No. Reason you're cold this window is open." This officer (Lt. Vertuno) gave him a blanket. Record at 1588, 1704.

The next thing he remembered was being told by two officers he had to be fingerprinted. He was in pain and couldn't see who these officers were. They led him down some stairs, fingerprinted him, and ordered him to sign something. He said he couldn't see

and asked if he could wait until his wife got there. Record at 1589. To this, one of the officers replied, "It's nothing but your fingerprints. God damn it, that's the reason you're looking like you are now." The officer took his hand and forced his signature. Record at 1589. He was returned to the same cell. This 5' x 7' cell, in which Lenard was incarcerated from 1:30 p.m. until 3:00 a.m., was the only cell of four which did not have a cot, bunk, or any place where a person can sit. An arrestee is put in that cell when the officer feels as though the arrestee will not be locked up for very long. Otherwise, he's put in one of the other cells where there are bunks. Record at 1126, 1129.

While Lenard lay injured and semi-conscious in this cell, his step-son, Floydell Hennings, also a Harvester employee, went to the police station at

approximately 3:50 p.m. Record at 1433. Hennings was dispatched by a family member to check on Lenard after she had been telephoned by one of Lenard's co-workers who had observed Lenard being taken into custody at the accident scene. Record at 1431-1433. Hennings did not know that his father was injured. Record at 1439. When he arrived at the station, he spoke to Lt. Vertuno and to officer Argento who was in the desk area. Although bond had been set at 2:30 p.m., Record at 457, Vertuno told Hennings that Lenard had not yet been processed, so Hennings could not see him. Record at 1435. Argento, who was standing nearby, also said "No, you can't see him." Record at 1436-1437. This, in spite of a police department rule that requires the desk or arresting officer to call friends or family of an arrestee in order to post

bail. Record at 479-480. No one told Hennings that Mr. Lenard was laying in the cell seriously injured, Record at 1479. No call had been made to the Lenard family notifying them that Lenard was in custody, and no urgently needed medical care had been administered. It was not until after Hennings made the 1 1/2 hour drive back to the Lenard home that he got a call from Lenard pleading for someone to get him out of jail because they were trying to kill him. Record at 1439-1440. He, his mother, aunt and sister then drove back to the Melrose Park Station. Record at 1441.

Mrs. Lenard went into the cell area. Hennings heard her scream, and he and his aunt went back. Record at 1442. Lenard was laying on a slab. There was water on the floor. Hennings touched his father, and Lenard raised up. He had, according to Hennings, been beaten beyond

recognition. Record at 1443.

Hennings returned to the desk area and called an attorney. Record at 1444. When he got off the telephone, Officer Spair, a cousin of Sansone's, Record at 745, told Hennings that he would "like to see me with my glasses off." Record at 1445. Another officer behind the desk told Spair "Pull your gun or night stick and go around there and show him what a man is." Record at 1446. At this point, Vertuno came in and told Spair to go outside and go to work. Record at 1447-1448.

At 8:00 p.m., Lenard was finally taken to a nearby hospital by two officers. He was returned to the same concrete cell at around 9:00 p.m. He was still shaking from the cold, the floor was still wet, and he was in pain. Record at 1594-1595. When Mrs. Lenard returned

again at approximately 3:00 a.m. and while she was posting bond, a voice came over the speaker at the desk saying "Chicken George, Chicken George, kill that nigger, kill that nigger." Record at 1450. The officer at the desk acted like that was normal, Record at 1451, and did nothing about it. Finally, after being released to his family, Lenard was taken to another hospital where he was immediately admitted. Record at 1596.

## ARGUMENT

### INTRODUCTION

The Petitioners claim there is an important federal question in need of resolution here and that the Seventh Circuit decision is in conflict with applicable decisions of this Court. Both of these would be factors weighing in favor of granting certiorari under Supreme Court Rule 17 if they existed, but they don't. What the Petitioners are

asking for essentially is a review of the evidence even though the jury, district court and appellate court all approved the findings of fact below. Because they rely on misrepresenting the decision of the Court of Appeals and a version of the facts as they wish them to be, the Petitioners are able to construct questions for review which are not presented by the record in this case.

I

THERE WAS NO FINDING BY THE COURT OF APPEALS OF A CIVIL CONSPIRACY IN THE ABSENCE OF AN OVERT ACT

Question 1 is not raised by this case. Here the Petitioners amazingly assert that the Court of Appeals contravenes established law by allowing recovery for a civil conspiracy where there was no overt act. Petition for Writ of Certiorari at 13. They then turn around and quote the Seventh Circuit's

holding that

> [t]here was sufficient evidence for a jury to reasonably believe that there was an overt act and circumstantial evidence of an agreement among the police, particularly Argento and Sansone, to conspire to deprive Lenard of his civil rights.

Petition for Writ of Certiorari at 25.

This holding, which is the heart of this case, is entirely consistent with, and relies upon a correct analysis of the established law on civil conspiracy. The Court of Appeals plainly states that

> there cannot be a civil cause of action for conspiracy under §1985 without an overt act. Williams v. St. Joseph Hospital, 629 F.2d 448, 451 n.3 (7th Cir. 1980). "[I]t is the overt act which moves the conspiracy from the area of thought and conversation into action and causes the civil injury and resulting damage." Hoffman v. Halden, 268 F.2d 280, 295 (9th Cir. 1959), overruled in part on other grounds, Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962)

Lenard v. Argento, 699 F.2d 874, 883.

Furthermore, the Court of Appeals, quoting Hoffman-LaRoche, Inc. v. Greenberg, 447 F.2d 872, 875 (7th Cir. 1971) goes on to say at 883:

> Circumstantial evidence may provide adequate proof of conspiracy. The law does not demand proof that each conspirator knew the exact limits of the illegal plan or the identity of all participants therein.

Citing Hampton v. Hanrahan, 600 F.2d 600, 621, (7th Cir. 1979) rev'd in part on other grounds, 446 U.S. 754 (1980) it reiterates, at 883, that

> [i]n such a situation, "it is the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusion as to the facts.'" [citing Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 700-01 (1962).]

See also Adickes v. Kress, 398 U.S. 144, 176 (1970) (Black J., Concurring).

There cannot be a more plain and correct statement of the law of civil conspiracy. The Court of Appeals simply applies the

law to the facts of this case and concludes that "[f]rom a review of the facts and record in this case, it was not unreasonable for this jury to reach the verdicts regarding Counts I and II." Lenard v. Argento, 699 F.2d at 883.

By misrepresenting what the opinion was Petitioners try to sneak in the back door what they can't get in through the front--a review of the evidence of this five and one-half week trial and a setting aside of the jury's verdict.

Numerous overt acts were pled and proven in this case. Petitioners skirt this obvious fact by mischaracterizing this case as having just one overt act--a beating. Yet, as the opinion of the Court of Appeals notes, "the charge given to the jury was not a 'conspiracy to perform a beating' but rather a conspiracy to deprive [Lenard] due course

of justice and equal protection of the law." Lenard v. Argento 669 F.2d at 882. The charge was "not isolated to a particular event, but rather related to the deprivation of ...'equal protection' under the law." Id. It is elementary that there are numerous ways in which one can be deprived of equal protection under the law. It appears as if the Petitioners erroneously view 42 U.S.C. §1985 as if it were the conspiracy counterpart of a substantive §1983 action, which it is not. Section 1985 grants a separate and distinct right of action from that granted under 42 U.S.C. §1983. Bottone v. Lindsely, 170 F.2d 705 (10th Cir. 1948), cert. denied, 336 U.S. 944 (1949).

The record refutes Petitioners' representation that "there is not a scintilla of evidence to connect either officer Argento or Officer Sansone to

these acts," or that Argento's "only further involvement with Lenard was when he returned to the cell a few minutes later to inquire whether Lenard wanted to see a doctor, which Lenard refused." Petition for a Writ of Certiorari at 22-23 (Emphasis in the original). For one thing, in addition to being present at the accident scene, Sansone was present in the Police Station and participated with Argento in conversation about the case and in preparing reports. Record at 667. As to Argento, in addition to his involvement in bringing Lenard into the station and the cell, there is direct evidence both from Hennings and Lt. Vertuno that Argento, who, along with at least four other officers, knew Lenard lay seriously injured in the cell, deliberately concealed this information from Hennings

(and from Dreyer as well), participated in lying about not being processed, prohibited Hennings from seeing his father, stripped Lenard of his clothing, then callously joked about it with Dreyer, and denied Lenard urgently needed medical treatment. And, "there was sufficient evidence of racially discriminatory animus to meet the Griffin standard for §1985 conspiracies." Lenard v. Argento, 699 F.2d at 883. As the Court of Appeals notes, because of Lenard's condition, he was unable to identify the officers involved. This is hardly tantamount to absolving Argento and Sansone of culpability as the Petitioners argue.

It is not necessary that Argento and Sansone personally performed all the sadistic acts proven. Conspiracy is merely the mechanism to impose liability on one defendant for the acts of the

others performed in pursuance of the conspiracy. See Nesmith v. Alford, 318 F.2d 110, 126 (5th Cir. 1963), cert. denied, 375 U.S. 975 (1964). There was more than sufficient evidence from the injuries Lenard sustained while he was in custody for the jury "to reasonably conclude that at least Argento and Sansone had entered into and committed 'an act' in the furtherance of a conspiracy to deny equal protection." Lenard v. Argento, 699 F.2d at 883. It hardly serves the cause of jurisprudence when a Petitioner mistates what the opinion of the court below was, and then, relying on the facts of the case for his argument, goes on to misrepresent what those facts were.

II

PETITIONERS WERE HELD LIABLE FOR DAMAGES SUSTAINED AS THE RESULT OF THE CONSPIRACY TO DEPRIVE RESPONDENT OF EQUAL PROTECTION OF THE LAW

Question 2 is similarly not presented by the record. The Court of Appeals did not rule, as Petitioners claim, that conspirators will be held liable for damages not shown to be the result of acts performed in furtherance of the conspiracy. The general conspiratorial objective in this case was to deprive Bennie Lenard of the due course of justice and equal protection of the law.

> As previously indicated, any act in the furtherance of or implementation of the conspiracy agreement creates the liability. Thus, if the jury found an agreement between Argento and Sansone and an act in the furtherance of that agreement to hinder the due course of justice or to deny equal protection under the law, the civil conspiracy is triggered. It is within the dominion of the jury to decide

> upon the evidence what act of the defendants supported the conspiracy.....

Lenard v. Argento, 699 F.2d at 894.

The Court of Appeals, in reviewing the evidence contained in over 2,500 pages of trial transcript, found that there was enough evidence for the jury to conclude that Argento and Sansone entered into and committed "an act" in furtherance of a conspiracy to deny equal protection, and that as a result Lenard sustained injury. The conspiracy encompassed the injuries sustained by Lenard while he was in police custody. The court cited Hampton v. Hanrahan, 600 F.2d at 621 for the established principle of conspiracy law that it is not necessary to

> prove that each participant in a conspiracy knew the "exact limits of the illegal plan or the identity of all participants therein." (citation omitted)..... The participants in the conspiracy must share the general

> conspiratorial objective, but they need not know all the details of the plan designed to achieve the objective..[I]t simply must be shown that there was "a single plan, the essential nature and general scope of which [was] known to each person who is to be held responsible for its consequences."

Lenard at 882.

Petitioners are again engaging in sleight-of-hand when constructing Question 2 out of thin air and they are continuing to misrepresent the facts to keep it afloat.

The Seventh Circuit's finding that "it was not unreasonable for this jury," Lenard v. Argento, 699 F.2d at 883, to find the conspiracy to deprive Lenard of his constitutional rights is one which this Court should hesitate to review. This Court has always been reluctant to review evidence which has already been found sufficient by a jury and two courts below. Rogers v. Lodge, ___U.S.___, 102 S.Ct. 3272, 3279 (1982); Branti v.

Finkel, 445 U.S. 507, 100 S.Ct. 1287, 1291 n.6 (1980) (refers to "our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred..."); Int'l Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 99 S.Ct. 2121, 2124 n.7 (1979); United States v. Ceccolini, 435 U.S. 268, 98 S.Ct. 1054, 1058 (1978); Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949). See also United States v. Johnston, 268 U.S. 220, 227 (1925); Houston Oil Co. v. Goodrich, 245 U.S. 440, 441 (1918). The deference to factfinders inherent in this "two court rule" is especially strong where the credibility of witnesses was central to the findings. Such was the case here. See Berenyi v. District Director, 385 U.S. 630, 635 (1967). For this reason, and others, this Court has

wisely been reluctant to review findings of fact in cases like the instant one.

Nor does the Seventh Circuit's application of the law of civil conspiracy to this case conflict with decisions of this Court as Petitioners claim. Much less can there be found the "direct, immediate and irreconcilable" conflict which weighs heavily in favor of issuance of a writ of certiorari. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 273 (5th ed. 1978). The cases cited by the Petitioners as conflicting with the decision in the instant case merely stand for the proposition that an overt act, whereby another was injured or deprived of his rights, is necessary before liability for a civil conspiracy can attach. Petition for Writ of Certiorari at 14-15.

The Petitioners cite Carey v.

Piphus, 435 U.S. 247 (1978) as their prime example of a legal conflict because in Carey "this Court recognized that as a general rule tort rules of damages should be applied in civil rights actions..." Petition for Writ of Certiorari at 30. While it is true that in Carey this Court recognized that common law tort rules of damages are "the appropriate starting point" in fashioning a theory of civil rights damages, the Court goes on to note that where constitutional rights are involved, "the common law does not always recognize an analogous cause of action, Id., 435 U.S. at 258. Consequently, "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." Id. at 259. And finally, "courts of law are capable of making the types of judgment

concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of [constitutional] rights." Id., quoting Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 409 (1971).

The Seventh Circuit has done nothing in conflict with the principles of Carey. It has, in fact, been faithful to all these principles by applying the general rules of liability for civil conspiracy. Since the common law does not recognize a conspiracy to deprive one of equal protection, it necessarily would not impose liability for manifestations of such a conspiracy that do not overlap a common law tort. On the other hand, §1985(c) covers all unconstitutional conspiracies which otherwise meet the statutory criteria.

The Petitioners do not seem to

understand this point. Deprivations of equal protection can be both subtle and broadreaching. In this case the deprivation encompassed a wide range of police conduct that injured Lenard after he was taken into custody. The lower courts both found that it could reasonably be concluded that these injuries were the result of an unconstitutional conspiracy set into motion by Argento and Sansone. That conclusion presents no conflict with applicable law.

Nor does this case present a significant question of federal law that is in need of resolution. For the reasons discussed above, Question 2 has been cut out of whole cloth and not out of the fabric of this case. It simply is not presented here. In addition, the facts of the instant case are so egregious, "the magnitude of injury" so

great, that the Seventh Circuit's holding is a limited one which might not be applicable in less severe situations.

III

PETITIONERS ARE LIABLE FOR INJURIES AND DEPRIVATIONS SUSTAINED BY RESPONDENT AND THE "LAWFULNESS" OF THE ARREST IS NOT A BAR TO SUCH LIABILITY

With Question 3 the Petitioners ask how can they be liable for the injuries and constitutional deprivations sustained by Lenard while in custody regardless of the lawfulness of Lenard's arrest or the causation of the injuries and deprivations. The answer to this question has been argued throughout this Response, and is found in the body of established civil conspiracy law as correctly summarized and applied by the Court of Appeals. It is really the law of conspiracy that Petitioners are railing against. It does not matter which conspirator actually used excessive

force on Lenard, who doused him with water, who taunted him, who denied him medical care. The requisite causation has been established. The charge to the jury was "not isolated to a particular event but rather related to the deprivation of rights of 'due course of justice' and 'equal protection under the law.'" Lenard v. Argento, 699 F.2d at 892 (footnote omitted). This is not a state tort lawsuit. Under §1985 each overt act need not be independently actionable. Lawrence v. Acree, 665 F.2d 1319 (D.C. Cir. 1981). The scope of this conspiracy encompassed the injuries and deprivations of rights sustained by Lenard while in police custody.

Even Petitioners concede that it is established law that the use of excessive force or violence by law enforcement personnel violates the victim's

constitutional rights. Petition for a Writ of Certiorari at 33. As another court has said

> [T]he constitutionality of defendants' conduct rests on such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) (Friendly, J.) cert denied, 414 U.S. 1033 (1973).

Petitioners interpose the "lawfulness" of Lenard's arrest as if that somehow absolves them of any liability for injury and deprivation of constitutional rights sustained while in custody. Whether or not an arrest is lawful is irrelevant to the prohibition against deprivations of constitutional rights, the use of excessive force or the

imposition of punishment on a arrestee. See Bell v. Wolfish, 441 U.S. 520 (1979) (due process requires that a pretrial detainee not be punished); Estelle v. Gamble, 429 U.S. 97 (1976) (deliberate indifference of authorities to serious medical needs violates prisoner's rights); Putnam v. Gerloff, 639 F.2d 415 (8th Cir. 1981) ( violation of liberty without due process to chain and handcuff detainees who attempted escape); Clark v. Ziedonis, 513 F.2d 79 (7th Cir. 1975) (shot fired at youths ignoring command to halt while fleeing from a felony was unreasonable and excessive under circumstances).

In short, Petitioners have demonstrated no legal conflict regarding this question, nor have they pointed out how this is a federal question of sufficient import to merit Supreme Court

review.

Finally, it must be pointed out that granting the Petition for Writ of Certiorari at this time would be improvident because the Seventh Circuit has ordered a remand on the question of damages. The Petitioners remain free to seek appeal and certiorari after remand should they be dissatisfied with the results reached by the lower courts. They will not be prejudiced by waiting, while judicial economy is served by denying the writ at this point. This Court has often been reluctant to review cases that have not been finally disposed of. Brotherhood of Locomotive Firemen and Enginemen v. Bangor and Aroostook R.R., 389 U.S. 327, 328 (1967); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 254, 258 (1916) (certiorari not granted until sought for the second time; the first time appellate court had

remanded for issuance of injunction and determination of damages).

## CONCLUSION

Respondent respectfully suggests that the Petition for a Writ of Certiorari fails to indicate any basis for this Court's consideration. There is neither an important federal question here that is in need of resolution, nor is the decision of the Court of Appeals in conflict with applicable decisions of this Court. The jury, the district court and the Court of Appeals all found the Petitioners liable for depriving Bennie Lenard of his right to equal protection of the laws in violation of 42 U.S.C. §1983. The acts perpetrated against Lenard were sadistic, punitive and barbaric and are not, nor they be tolerated under the Constitution. The Petitioners have distorted both what the

decision of the Seventh Circuit held as well as what the evidence in the case was. For all these reasons this Court should deny certiorari, and attorneys fees should be awarded Respondent for preparation of this Answer.

Respectfully submitted,

_____
Attorney for Respondent

Edward T. Stein
SINGER & STEIN
53 W. Jackson Blvd.
Suite 1315
Chicago, IL 60604
(312)431-0082

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Office-Supreme Court, U.S.
FILED
JUL 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1692

IN THE

# Supreme Court of the United States

October Term, 1982

ROBERT ARGENTO and JOSEPH SANSONE,

*Petitioners,*

*v.*

BENNIE LENARD,

*Respondent.*

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN G. POUST,
*Counsel of Record*

STEPHEN E. SWARD
CHRISTINE M. WHEELOCK
Xerox Centre, Suite 1500
55 West Monroe Street
Chicago, Illinois 60603
(312) 372-5600
ROOKS, PITTS, FULLAGAR AND POUST
*Attorneys for Petitioners*

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## REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Although petitioners are satisfied that their statement of the case reflects a sincere effort to accurately present in the limited space available to them both versions of the occurrence, and that this is borne out by a review of the trial transcript, some comment is necessary as to the accusations made by respondent in reference to this matter. Throughout this litigation the tone of respondent's briefs has been in the same strident vein as here, in charging that petitioners "seriously misrepresented" what the evidence consisted of in this case (see, e.g., p. 4 of Answer) and of trying to "sneak in the back door what they can't get in through the front . . ." (p. 19 of Answer). The evidence summarized in petitioners' statement of the case is essential to this Court's understanding of the basis for

this Petition. In contrast, respondent's statement of the case consists largely of a summary of only his version of the occurrence. It is frequently undocumented by references to the record and in some instances contains inaccurate statements of the evidence.[1] (pp. 21-22 of Answer). The respondent's recitation in detail of his testimony regarding his alleged beating was rejected by the jury, and the jury's findings in this regard were affirmed by both the District Court and the Court of Appeals. Since respondent chose not to file a Cross-Petition for a writ of

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[1] For example, at page 22 of respondent's Answer, it is stated that Officer Argento "prohibited Hennings from seeing his father," thereby attempting to cause this Court to believe that Lenard was being held incommunicado. The fact is that Hennings testified that Lt. Vertuno said that Hennings could not see his father at that particular moment because he was being processed and because a shift change was underway which prevented an officer from accompanying Hennings. (R.P. 1436).

certiorari, these findings are not subject to review by this Court. See, e.g., United States v. O'Brien, 391 U.S. 367 (1968).

## ARGUMENT

### I. THE COURT OF APPEALS SUSTAINED A FINDING OF A SECTION 1985(3) CONSPIRACY IN THE ABSENCE OF AN OVERT ACT IN FURTHERANCE OF THE ALLEGED CONSPIRACY

Respondent's attempted answer to petitioners' argument that the Court of Appeals did not find an overt act in furtherance of the alleged Section 1985(3) conspiracy does not confront the arguments presented by petitioners. The Answer consists in large part of quotations from the opinion below, and ignores the critical issue involved in this Petition, i.e., whether or not there was evidence of an overt act in furtherance of the alleged conspiracy.

Petitioners have never contended that the Court of Appeals did not correctly cite the law of civil conspiracy. Rather, it is

petitioners' contention that the Court of Appeals erroneously applied the law in this case and in so doing has in effect completely and incorrectly changed the burden of proof necessary to establish a civil conspiracy under Section 1985(3).

As this Court has construed Section 1985(3), the plaintiff must allege and prove four elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. [Emphasis added]. United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott, 51 U.S.L.W. 5173, 5174 (No. 82-486, July 5, 1983).

In contrast to the law of criminal conspiracy, pursuant to which the mere existence of an illegal agreement may provide

the basis for a finding of liability, Section 1985(3) expressly requires "overt acts necessary to consummate the conspiracy as an actionable wrong." Collins v. Hardyman, 341 U.S. 651, 659 (1951). Accord, Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569, 576 (7th Cir. 1975), cert. denied, 425 U.S. 963 (1976), wherein the Court of Appeals for the Seventh Circuit stated:

> 'The damage for which recovery may be had in a civil action is not the conspiracy itself but the injury to the plaintiff produced by specific overt acts . . . The charge of conspiracy in a civil action is merely the string whereby the plaintiff seeks to tie together those who, acting in concert, may be held responsible for any overt act or acts.' Rutkin v. Reinfeld, 229 F.2d 248, 252 (2d Cir. 1956), cert. denied, 352 U.S. 844, 77 S.Ct. 50, 1 L.Ed.2d 60 (1956).

Despite the jury's finding that petitioners did not beat the respondent as alleged, the Court of Appeals relied heavily on respondent's alleged physical

injuries as the basis for the affirmance of the jury's finding of a 1985(3) conspiracy. Nowhere is this more apparent than in the following statement from the Court of Appeals opinion:

> While the jury may have found insufficient evidence of a beating, that does not mean that there was insufficient evidence of a §1985(3) conspiracy. The jury could have found that there was insufficient evidence to tie all the defendants to the alleged beating, yet enough evidence based primarily upon the injuries sustained by Lenard during his police custody, to reasonably conclude that at least Argento and Sansone had entered into and committed 'an act' in the furtherance of a conspiracy to deny equal protection. [Emphasis added]. 699 F.2d at 883.

Although the Court of Appeals ultimately concluded that given the jury's finding in favor of all defendants on Count I it had been determined that respondent was not beaten as alleged, and that this jury verdict should not be disturbed, the Court persisted in relying on respondent's

physical injuries as evidence of an overt act committed in furtherance of the alleged conspiracy.

This analysis is based upon an absolute non sequitur. Having found that petitioners did not beat respondent, it defies common sense to conclude that respondent's physical injuries resulted from an overt act in furtherance of the alleged 1985(3) conspiracy. Respondent was very explicit at trial as to how he claimed his injuries occurred. He testified that Argento hit him in the eye with a nightstick and that he was beaten at the station by Argento, Zito and Culotta, and no one else. The jury concluded that none of these officers, including petitioner Argento, engaged in this alleged beating.

Even if, as respondent argues, Sections 1983 and 1985(3) constitute separate causes of action, this does not mean that in the context of a particular

case the two sections are necessarily unrelated. This Court has repeatedly held that Section 1985(3) creates no substantive rights in and of itself, but merely provides a remedy for the violation of certain designated rights. See, e.g., Great American Federal Savings and Loan Association v. Novotny, 442 U.S. 366, 372 (1979). In the instant case the right of respondent alleged to have been violated was the "equal protection of the laws, or of equal privileges and immunities under the laws." More specifically, the gist of respondent's claim under Section 1985(3) was that he was deprived of equal protection of the laws by virtue of a conspiracy by petitioners and the other two defendant police officers to beat him. This alleged beating was the subject of Count I of the complaint, under which all defendants were acquitted. It cannot, therefore, constitute the overt act required under

Section 1985(3).

With respect to petitioner Sansone, respondent cites the fact that Sansone "was present in the police station and participated with Argento in conversations about the case and in preparing reports." (p. 21 of Answer). This conduct on the part of Sansone cannot possibly be construed as an overt act in furtherance of the alleged conspiracy since it occurred after the injuries of which respondent complains (and of which Sansone was not even accused of perpetrating by anyone including respondent) were sustained in the process of effectuating his arrest and removal to the police station when he was intoxicated and combative as found by the jury and affirmed by the lower courts. There is no evidence that either Sansone or Argento agreed to or perpetrated any of the indignities or other acts as to which respondent or any other witness testified.

## II. EVEN IF THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN A FINDING OF A SECTION 1985(3) CONSPIRACY, PETITIONERS CANNOT BE HELD LIABLE FOR RESPONDENT'S PHYSICAL INJURIES

Without waiver of the foregoing, petitioners reiterate as stated in their Petition that even if it is ruled that there was sufficient evidence to establish a conspiracy on the part of petitioners, and that the events occurring in the station, e.g., the alleged "Chicken George" episode or the alleged dousing with water, were undertaken in furtherance of this conspiracy[2], liability cannot be imposed upon petitioners for the physical injuries sustained by respondent.

Respondent's attempt to answer this point does nothing more than parrot the vague statements made by the Court of

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[2] Even though there is no evidence that either Argento or Sansone were involved in these alleged acts.

Appeals to the effect that respondent's physical injuries can be considered under the Section 1985(3) count. No attempt is made by respondent to answer the contention of petitioners that imposition of liability for respondent's physical injuries is wholly inconsistent with the basic principles of civil conspiracy as applied to this case. While it is certainly true that all conspirators need not participate in all acts to be held responsible for them, where the respondent himself has identified all of the alleged perpetrators and the jury finds them not guilty, imposing liability for these physical injuries on one or more of the alleged conspirators defies common sense. Nevertheless, the Court of Appeals has held that the alleged consequences of this "beating" that did not occur, i.e., respondent's physical injuries, can be considered by the jury in fixing damages

under a conspiracy theory. It is not surprising that respondent cannot justify this puzzling result when the law, logic and common sense demand the opposite result.

To permit in a retrial the introduction of the physical injuries sustained by respondent as against petitioners would be akin to a denial of their civil rights. Such a measure would, in effect, force them to be individual guarantors of a prisoner's safety, notwithstanding the prisoner's own behavior. We are mindful of the fact that it could be possible for officers after having made a lawful arrest to enter into a conspiracy to deprive a prisoner of his civil rights, but such is not the case here, as demonstrated by the trial record. Unfortunate things allegedly occurred in respondent's life after his arrest. The primary and significant one, i.e., his physical injuries,

have in effect been adjudicated to have been his own fault. It is perhaps unfortunate that the identity of those who may have perpetrated indignities other than the physical injuries have not been identified; however, if these actions occurred, they are not the fault of petitioners Sansone and Argento, but of persons unknown or the Village of Melrose Park. If, even in the face of what we present in Section I of this Petition, petitioners must stand trial for damages under Count II, it would be a gross injustice to have them saddled with evidence of serious injuries which they did not cause and with respect to which they have been adjudicated by a jury and two courts of not having liability by reason of the Count I verdict in their favor.

Further, such a result would be in direct contradiction of the law relating to civil conspiracy, since even a con-

spirator's liability, (which for the reasons recited on the preceding pages is not that of petitioners), can only be based upon "overt acts done pursuant to the conspiracy." Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corporation, 494 F. Supp. 1139, 1160 (D.Del. 1980).

While the record is absolutely devoid of evidence of any conspiracy in this case, had there been such a conspiracy it could only have occurred after respondent was brought into the station house. The Court of Appeals has found the arrest to be proper; the jury found there was no "beating" at the scene of the arrest nor during the entry to the station via the steps and the parking lot. The first possible opportunity for an alleged conspiracy to have been formed under these circumstances was in the station house. Yet according to the evidence presented by both respondent and petitioners, the eye and shoulder injuries

occurred before respondent was brought into the station itself, and all defendants were found not to have engaged in the acts alleged by respondent to have caused these injuries. Damage testimony must therefore be consistent with the jury's verdict on Count I and exclude these physical injuries. As the Court of Appeals for the Seventh Circuit stated in Hampton v. Hanrahan, 600 F.2d 600, 625 (7th Cir. 1979) rev'd in part on other grounds, 446 U.S. 754 (1980), a plaintiff who has established a conspiracy may recover only for "deprivation of those rights arising from the implementation of the conspiracy." [Emphasis added.]

The gross and obvious unfairness of including evidence of such physical injuries in a retrial is that despite the fact that it has already been adjudicated that petitioners are not liable for inflicting these injuries to the respon-

dent, it is probable that in assessing damages on retrial a jury would view this case as though they had. Jurors cannot be fair when they do not know the facts. After being told that the petitioners have been found guilty of a "conspiracy" to deprive respondent of his rights, the jurors are likely to assume the worst and return an inflated and wholly unwarranted award of damages.

In any retrial on damages, evidence of the physical injuries allegedly sustained by respondent must in law and in fairness to these individual petitioners not be permitted.

## III. GRANTING THIS PETITION FOR WRIT OF CERTIOARI WOULD NOT BE PREMATURE AND WOULD EXPEDITE RESOLUTION OF THIS LITIGATION

Respondent contends that because the Court of Appeals remanded one count of this case for a retrial on damages the granting of this Petition would be premature. To

the contrary, this case is a particularly appropriate one for this Court to exercise its discretion to grant review.

As this Court has recognized, absence of a final judgment should not be a bar to review by this Court where the issue presented is "fundamental to the further conduct of the case." United States v. General Motor Corp., 323 U.S. 373, 377 (1945).

As set forth in their Petition, petitioners, who are young law officers of limited means, face the potential of grave prejudice if this case is allowed to proceed to a jury under the erroneous rule of law announced by the Court of Appeals. The mention of insurance by the Court of Appeals omits the fact that the insurer denies coverage for intentional acts, punitive damages, and for all judgments herein rendered.

Moreover, contrary to respondent's assertions, postponement of the grant of this Petition will not serve the interests of judicial economy. A retrial would be conducted without really knowing whether the physical injuries are admissible. The vague and illogical ruling of the Court below will undoubtedly result in numerous evidence disputes between the parties as to how a trial should be conducted in order to attempt to conform with the opinion of the Court of Appeals and yet preserve some semblance of fairness to the parties.

Most significantly, a retrial under the constraints imposed by the Court of Appeals will not resolve the issues involved in this Petition. Respondent's gratuitous suggestion that petitioners should proceed to a retrial and apparently then have the "loser" come to this Court completely ignores the importance of the legal issues presented in this Petition

not only to these petitioners but to all police officers. Respondent's inference that all that is involved here is the amount of damages for which petitioners may ultimately be held liable is completely erroneous. Respondent has the cart before the horse. Before any retrial the parties here have a compelling need to know what the law requires. Under the circumstances it can best come from this Court before any retrial.

We ask this Court to rule as requested in our Petition.

Respectfully submitted,

John G. Poust
Counsel of Record

Stephen E. Sward

Christine M. Wheelock

John G. Poust
Stephen E. Sward
Christine M. Wheelock
ROOKS, PITTS, FULLAGAR AND POUST
55 West Monroe Street, #1500
Chicago, Illinois 60603
(312) 372-5600